(26,056)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 589.

BALL ENGINEERING COMPANY, PETITIONER,

vs.

J. G. WHITE & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

BALL ENGINEERING COMPANY, Plaintiff in Error,

against

J. G. WHITE AND COMPANY, Defendant in Error.

TRANSCRIPT OF RECORD.

Error to the District Court of the United States for the District of Connecticut.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Dec. 28, 1916. William Parkin, Clerk.

1 The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

Petition for Writ of Error.

The plaintiff in the above entitled action comes now by Cummings & Lockwood, its Attorneys, and says that on or about the 24th day of May, 1916, this Court entered judgment herein in favor of the defendant and against the plaintiff to recover of the plaintiff its costs.

That in said judgment and the proceedings herein had prior thereto in this action certain errors were committed to the prejudice of the plaintiff, all of which will in more detail appear from the assignment of errors which is on file with this petition.

Therefore, the plaintiff prays an order of this Court allowing said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Second Circuit, and that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and in accordance with the laws of the United States in such case made and provided. And that a transcript of the record and proceedings and exhibits and papers in this case duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated this 11th day of August, 1916.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.

2 Upon the filing of the foregoing petition for a writ of error and of an assignment of errors as therein stated, and upon motion of Cummings & Lockwood, attorneys for the plaintiff, it is

Ordered, that a writ of error be and is hereby allowed as in said petition prayed, and a bond with sufficient surety having heretofore been filed by the plaintiff to cover all costs in this action, execution upon said judgment is to be stayed.

Dated this 24th day of August, 1916.

HARLAND B. HOWE,
United States District Judge.

3 *Writ of Error.*

The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

THE UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States of America to the Judges of the District Court of the United States for the District of Connecticut, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a complaint, which is in the District Court before you between the Ball Engineering Company of the State of Missouri, plaintiff, and *the* J. G. White & Company of the State of Connecticut, defendant, a manifest error hath happened to the great prejudice and damage of the plaintiff as is said and appears by its complaint.

We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Judges of the United States Circuit Court of Appeals for the Second Circuit in the City of New York, together with this writ, so that you have the same at the said City of New York in the State of New York in said Circuit on the 22d day of September 1916, in the said Circuit Court of Appeals to be then and there held, that the

4 record and proceedings aforesaid being inspected, the said Judges of the Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States ought to be done.

Witness the Honorable Edwin S. Thomas, United States District Judge, this 24 day of August in the year of our Lord one thousand

nine hundred and sixteen, and of the Independence of the United States the one hundred and forty-first.

C. E. PICKETT,
Clerk of the District Court of United States of America for the District of Connecticut, in the Second Circuit.

The foregoing writ of error is hereby allowed this 24th day of August, 1916.

HARLAND B. HOWE,
U. S. District Judge.

5 The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE AND COMPANY.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

To J. G. White and Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit to be holden at the City of New York in the State of New York within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Connecticut, whereby the Ball Engineering Company of Missouri is plaintiff-in-error, and you, J. G. White & Company of Connecticut, are defendant-in-error, to show cause, if any there should be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Hartford in the District of Connecticut this 24th day of August, 1916.

HARLAND B. HOWE,
United States District Judge.

Due and legal service of the above citation is hereby accepted for and on behalf of the defendant.

Dated at Hartford, Conn., August 27, 1916.

LEWIS SPERRY,
Attorney for Defendant.

6 The District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY, Plaintiff,

v.

J. G. WHITE & COMPANY, Defendant.

Assignment of Errors and Prayer for Reversal.

Now, on the 11th day of August, 1916, comes the plaintiff by Cummings & Lockwood, its attorneys, and prays for the reversal of the judgment entered in the above entitled case on or about the 24th day of May, 1916, in favor of the defendant and against the plaintiff, and as ground for reversal sets forth and files the following assignment of errors upon which it will rely upon the prosecution of the writ of error in the above entitled action:—

1. The Court erred in ruling and in sustaining the ruling and conclusion of the Committee, number 6 of his conclusions, contained in the report of the committee, that the Government of the United States took title to said property as sovereign, and that the defendant, which thereafter used the same, was not guilty of conversion.

2. The Court erred in sustaining the conclusion of the Committee number 7 of his conclusions, that judgment ought to be rendered in favor of the defendant.

3. The Court erred in entering judgment in said action in favor of the defendant and against the plaintiff.

Wherefore, said plaintiff prays that the judgment of said Court be reversed.

Dated at Hartford, Conn., August 11th, 1916.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.

7 *Summons and Complaint.*

UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to attach to the value of Twenty-five thousand ($25,000) Dollars the goods or estate of the J. G. White & Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and a citizen of said State, and it summon to appear before the Circuit Court of the United States for the District of Connecticut, next to be held at Hartford, on the first Monday in June, A. D. 1911, then and there to answer unto Ball

Engineering Company a corporation organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, in a civil action wherein the plaintiff complains and says:

1. The plaintiff, Ball Engineering Company, is and has been for a long time, and was at the several dates hereinafter mentioned, a corporation duly incorporated under the laws of the State of Missouri, and a citizen and resident of said State, having its domicile and principal place of business in the City of St. Louis, in said State of Missouri.

2. The defendant, J. G. White & Company, is and has been for a long time, and was at all the several dates hereinafter mentioned, a corporation incorporated under the laws of the State of Connecticut, and a citizen and resident of said State of Connecticut, having its domicile and principal place of business in the City of Bridgeport in said State of Connecticut.

8 3. On and before June 1, 1910, the plaintiff was the owner of certain personal property described and valued as follows: One anvil of the value of $12.00; 2 — 1 yd. bottom dump concrete buckets of the value of $150.00, being of the value of $75.00 each; 10 — 1½ yd. Western dump cars of the value of $875.00, being of the value of $87.50 each; 10 — Koppell 1 yd. cars of the value of $675.00, being of the value of $67.50 each; 1 — Derrick, cotton wood mast and boom with fittings and guy wires, both without hoisting cable standing on north end of wall of the value of $250.00; 1 — Derrick, steel mast and boom with fittings and guy wires, but without hoisting cables of the value of $1,300.00; 1 — Drill press of the value of $10.00; 2 — 3 drum hoisting engines of the value of $3,000.00, being of the value of $1,500.00 each; 1 — Forge of the value of $3.00; 1 — Grindstone of the value of $1.00; 1 — Jack screw of the value of $2.00; 1 — Smith-Vaile pump, 2″ discharge of the value of $75.00; 1 Smith-Vaile pump, 3″ discharge of the value of $100.00; 1 — pump 1½″ discharge of the value of $50.00; 1 — 3″ steam pipe line 600 ft. long of the value of $132.00; 1 — 2″ steam and water pipe line 294 ft. long of the value of $56.00; 1 — vise of the value of $4.00; 1 — Crosscut saw of the value of $3.00; blacksmith's blower and small tools of the value of $30.00; 1 — cement shed, 1 — blacksmith shop, 1 — material house and 1 — 2-story bunk house, all of the value of $500.00; 1 — mess room, 1 — kitchen and commissary, 1 — office building and three bunk houses, all of the value of $200.00; 1 — tramway 16 lbs. steel 11,407 ft. of track, 1 — tramway 20 lbs. steel 281 ft. of track and 86 lineal ft. loose rail, all of the value of $4,000.00; 1 — suspension bridge, 350 ft. span and 1 — still for water, both of the value of
9 $500.00; 1 — set derrick fittings of the value of $200; 14,502 ft. round piles of the value of $1,450.20; 11,020 ft. sheet piling ready to drive of the value of $385.70; 10,480 ft. sheet piling 12 x 12 ready to drive of the value of $419.52; 480 — bolts with washers ¾ x 12 of the value of $21.00 being of the value of $.04⅜ each; 1,100 lbs. nails of the value of $30.00, being of the value of $.02 8/11 each; 50 cords of wood of the value of $100.00, being of the value of $2.00 per cord; 22 gauges for pier of the value of $44.00, being of the value of $2.00 each; 8 — Capstan levers, 8 — Friction

roller arms, 8 — journal boxes for dam, 52 cast journals and 8 cast gate anchors, all of the value of $375.00.

4. On and before said date of June 1, 1910, said personal property was situated in the County of Ellis, in the State of Texas, at and near what was and is known as Lock and Dam No. 6 on the Trinity River.

5. On or about said date of June 1, 1910, the defendant, its servants, agents and employees, over the objections and protest of plaintiff and against plaintiff's express directions, unlawfully seized upon said personal property and converted the same to the use of the defendant.

6. The said property so seized and converted to defendant's use has never been restored to the possession or use of the plaintiff.

7. The said personal property was, at the time of said seizure and conversion, of the total value of Fifteen thousand (15,000) Dollars.

8. By reason of the said seizure and conversion of the said personal property, the plaintiff has been deprived of said property and the use thereof and has been damaged thereby.

10 The plaintiff claims twenty thousand (20,000) dollars damages.

Charles D. Lockwood of Stamford is recognized in the sum of One hundred-fifty (150) Dollars to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit Court at the City of Hartford, within the Second Circuit and the District of Connecticut, this 17th day of May, in the year 1911, and of the Independence of the United States of America the 135th.

R. F. CARROLL.
Deputy Clerk.

CUMMINGS & LOCKWOOD.
Attorneys for Plaintiff.

The above and foregoing is a true copy of the original complaint and summons.

Attest,

EDSON S. BISHOP,
U. S. Marshal,
By WILLIAM L. PARMELEE,
Deputy U. S. Marshal.

DISTRICT OF CONNECTICUT,
Fairfield County, ss:

BRIDGEPORT, May 19th, 1911.

Then and there by virtue hereof, I made service of this writ
11 by leaving a true and attested copy of the same with W. T. Hinks, as he is the agent of the J. G. White and Company, the within named defendant.

Attest,

EDSON S. BISHOP,
United States Marshal.
By WILLIAM L. PARMELEE,
Deputy United States Marshal.

Fees:—

18 miles travel	$1.08
1 service	2.00
	$3.08

12 BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY, Incorporated, Sued by the Name of J. G. White & Company.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Answer.

1. As to the allegations contained in paragraph 1, the defendant has not sufficient information to form a belief and leaves the plaintiff to his proof.

2. The allegations contained in paragraph 2 are admitted except that the name of the defendant J. G. White & Company, Incorporated, is therein erroneously stated as being J. G. White & Company.

3. As to the allegations contained in paragraph 3 of the complaint, the defendant denies the same and for further answer thereto says:

(*a*) On or about the 10th day of July, 1906, Captain W. P. Wooten of the Corps of Engineers, United States Army, acting for and in behalf of the United States of America, as party of the first part, entered into an agreement with the Hubbard Building and Realty Company, a corporation organized under the laws of the State of Texas, as party of the second part, wherein the said Hubbard Building and Realty Company agreed to construct lock and dam No. 6 in section one of the Trinity river, Texas, in accordance with plans and specifications attached to the said agreement and forming a part thereof, and wherein it was agreed that the said Hubbard
13 Building and Realty Company would complete the construction of said lock and dam not later than September 1st, 1908.

(*b*) Among other things it was provided in and by said agreement as follows:

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party

or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

14 "5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. * * *

It was further provided in the said specifications annexed to and forming a part of said agreement by the paragraph of said specifications numbered 33, as follows:

"Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge."

(c) The said Hubbard Building and Realty Company failed to complete the construction of said lock and dam under the terms of said agreement within the said period thereby limited, whereupon the United States granted extensions for the completion of the said construction, but said Hubbard Building and Realty Company failed within the time so extended to complete the construction of said lock and dam. The said Hubbard Building and Realty Company having failed to prosecute faithfully and diligently the work under the said agreement in accordance with the specifications and require-

15 ments thereof, and having failed to complete the construction of the said lock and dam within the time limited by said agreement as extended as aforesaid, in or about the month of June, 1910, the said agreement of the Hubbard Building and Realty Company was annulled pursuant to the provisions thereof, hereinbefore set forth, and notice of such annulment in writing was given to the Hubbard Building and Realty Company. Thereupon, and in or about the month of June, 1910, and pursuant to the said paragraph

numbered 33 of the specifications annexed to said agreement, the United States took possession of certain materials, tools, buildings, tramways and cars and other property prepared for use or in use in the prosecution of the work under said agreement at a valuation of about $11,578 determined by the engineer officer in charge and the said sum of $11,578 was thereupon paid to or credited to the account of the said Hubbard Building and Realty Company by the United States.

(*d*) The said Hubbard Building and Realty Company having failed to prosecute faithfully and diligently the work under its said agreement in accordance with the specifications and requirements thereof, and having failed to complete the construction of said lock and dam as aforesaid, and the United States having taken possession of said materials, tools, buildings, tramways, cars and other property at said valuation determined as aforesaid — the United States thereupon entered into an agreement with this defendant for the completion by this defendant of the construction of the said lock and dam No. 6 in the manner therein set forth, and the United States thereupon leased to this defendant said materials, tools, buildings, tramways, cars and other property, of which the Government had taken possession as aforesaid, at a monthly rental of about $380, and
16 this defendant thereafter duly and promptly paid to the United States said rental for the use of said property, and at all times thereafter, until the subsequent surrender of the same as hereinafter set forth to the United States, this defendant held possession thereof and used the same as the lessee of the United States, and with its authority.

(*e*) All of the several articles of property enumerated in the paragraph of the complaint herein numbered 3, were prepared for use or were in use in the prosecution of the work provided to be performed by said agreement of the Hubbard Building and Realty Company at the time said Company failed to prosecute the work in accordance with the specifications and requirements of the said agreement, and at the time the said Company failed to complete said work in accordance with said agreement. With the exceptions hereinafter set forth, after the said failures of the Hubbard Building and Realty Company to perform its said agreement, the United States took possession of all of said property enumerated in the paragraph of the complaint herein numbered 3, at a valuation of about $11,578 determined by the engineer officer in charge, in pursuance of the above quoted provisions of the said agreement of the said Hubbard Building and Realty Company. With the exceptions hereinafter set forth, all of the said property enumerated in the said paragraph of the complaint numbered 3, and which the plaintiff alleges was converted by this defendant to its own use, was the same property which is hereinbefore referred to in subdivisions (*c*) and (*d*) of this paragraph numbered 3 of the answer and which was prepared for use or in use in the construction of the said work at the time of the said failure of the Hubbard Building and Realty Company to perform its said agree-

ment, and was located at or near the immediate vicinity of
17 said lock and dam No. 6 upon land belonging to or in the possession of the United States. The exceptions to which reference is above made are that the United States did not take possession of 14,502 feet of round piles, nor of 11,020 feet of sheet piling ready to drive, nor of 10,480 feet of sheet piling, 12 x 12, ready to drive, which said amounts are set forth in the said paragraph of the complaint numbered 3, but did take possession in the manner aforesaid of about 13,120 feet of round piles and of about 10,768 feet of sheet piling ready to drive and of about 9,552 feet of sheet piling, 12 x 12, ready to drive.

(*f*) Prior to the commencement of this suit the construction of said lock and dam No. 6 on the Trinity river in the State of Texas was completed, and also prior to the commencement of this action this defendant relinquished possession to the United States of all of said property referred to in subdivisions (*c*), (*d*) and (*e*) of this paragraph of this answer and in the paragraph of the complaint herein numbered 3, in possession of which this defendant has been as lessee thereof from the United States as aforesaid, except that in said paragraph numbered 3 of the complaint the amount of piling is inaccurately set forth as hereinbefore stated in this paragraph of this answer, and except that this defendant did not relinquish possession to the United States of a certain portion of the said materials which had theretofore been supplied for the prosecution of the work provided to be performed under the said agreement between the United States and the said Hubbard Building and Realty Company, which said materials were with the consent of the United States actually used by this defendant and became a part of the said work and of the said lock and dam No. 6.

4. As to the allegations of paragraph 4 of the complaint
18 this defendant denies the same, except that it admits that on or about June 1st, 1910, the property referred to in the foregoing paragraph numbered 3 of this answer, which this defendant is informed and believes and ther-fore alleges is the same property as that described in the paragraph of the complaint numbered 3 (except that in said paragraph 3 of the complaint the amount of piling is inaccurately set forth as stated in subdivision (*e*) of the foregoing paragraph numbered 3 of this answer), was situated in the County of Ellis, in the State of Texas, at and near what was and is known as lock and dam No. 6 on the Trinity river.

5. The allegations of paragraph 5 of the complaint are denied.

6. As to the allegations of paragraph 6, this defendant denies that it ever seized and converted any of said property referred to in the complaint or in this answer to its own use, and further alleges that previous to the commencement of this suit, this defendant as lessee as aforesaid surrendered possession of the said property to the Government of the United States as the owner thereof, and at the time of the commencement of this suit, and for a long time before, this defendant did not have possession of said property nor any part thereof, and did not assert or claim any right, title or interest therein.

7. The allegations of paragraphs 7 and 8 of the complaint are denied.

Dated, August 19th, 1911.

J. G. WHITE & COMPANY, INCORPORATED,
The Above-named Defendant,
By BYRNE & CUTCHEON AND LEWIS SPERRY,
Attorneys.

10 United States of America, District Court, District of Connecticut, October 27, 1911.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

Reply.

1. As to the allegations contained in paragraph 3 (*a*), (*b*), (*c*), (*d*) and (*f*) of the answer the plaintiff has not sufficient information to form a a belief.

2. The allegations contained in paragraph 3 (*e*) are denied.

3. The following allegations of paragraph 6 are denied:

"That previous to the commencement of this suit, this defendant as lessee as aforesaid surrendered possession of the said property to the Government of the United States as the owner thereof."

As to the other allegations of said paragraph 6, the plaintiff has not sufficient information to form a belief.

BALL ENGINEERING COMPANY,
By CUMMINGS & LOCKWOOD,
Its Attorneys.

20 In the United States District Court, in and for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE COMPANY.

Order.

The above entitled case, the pleadings having been closed to the Court and said case having been noticed for trial, came on to be heard at the February 1916 Term of the United States District Court in the District of Connecticut held at the United States Court Rooms, Post

Office Building, in the City of New Haven, Connecticut, on the 13th day of March, 1916.

Present, the Honorable Edwin S. Thomas, United States District Judge of the District of Connecticut, and upon the annexed stipulation of attorneys for the plaintiff and the defendant it is hereby

Ordered: that said action be and the same hereby is referred to George D. Watrous, Esquire, of New Haven, as sole Committee to hear and determine the same and report his findings of fact and conclusions of law with all convenient speed, with the same force and effect as if said action had been brought before the Court and jury, and that the report of said Committee shall be treated by the Court for the purpose of entering judgment thereon, as though it were the special verdict of the jury, and shall have the same force and effect as though it were the special verdict of a jury. No waiver of exceptions to evidence is intended hereby. And it is further

Ordered: that the hearings before said Committee shall proceed with all due diligence and speed to the end that the findings of fact and conclusions of law may be promptly had, and it is further

Ordered: that no judgment shall be entered herein until after ten days' notice of the filing of the report of the Committee and of the judgment proposed to be entered thereon. And it is further

Ordered: that the fees of said Committee and of the stenographer employed to take testimony in said cause shall be taxed as costs and paid in the first instance, one-half by each party.

Dated at New Haven, Conn., this 13th day of March, 1916.

EDWIN S. THOMAS,
United States District Judge.

Stipulation.

We hereby consent to the entry of the foregoing order.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.
J. KEMP BARTLETT,
LEWIS SPERRY,
Attorneys for Defendant.

22 In the United States District Court, in and for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE COMPANY.

Stipulation.

We, the attorneys for the respective parties hereto hereby waive the trial to the jury of this cause, and agree to submit same to the Court, without intervention of the jury.

Dated at New Haven, Connecticut, this eighth day of October, 1912.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.
LEWIS SPERRY,
Attorney for Defendant.

23 In the United States District Court, in and for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE COMPANY.

Report of Committee.

To the Honorable District Court of the United States for the District of Connecticut:

The undersigned, having been appointed by this Honorable Court, sole Committee to hear and determine the above entitled cause, and to report his findings of fact and conclusions of law therein, by Order dated the 13th day of March, 1916, pursuant to stipulation of counsel, annexed thereto, respectfully submits his report as follows:

1. On the 21st day of March, 1916, the parties appeared before him by counsel only; being at issue upon the same pleadings as on the original trial of said action, as appears on file.

The Committee having been duly sworn, and the parties having stipulated that all of the evidence submitted to the Committee at the former trial should be submitted as all of the evidence at this trial, no further testimony was offered.

The findings of fact are the same as submitted at the former trial, except that certain exhibits admitted in evidence at the former trial

are, at the request of counsel, annexed hereto and by reference made a part hereof; the conclusions of law being in conformity with the decision of the Honorable United States Circuit Court of
24 Appeals for the Second Circuit upon a writ of error to this Court, after the rendition of the judgment of this Court, after the former trial.

2. It was admitted that the corporate name of the defendant was "J. G. White & Company, Incorporated," and the Committee so finds.

3. On or about April 2nd, 1910, the plaintiff, "Ball Engineering Company," was incorporated under the laws of the State of Missouri, with a capital stock of $50,000, divided into 500 shares of the par value of $100 each. Ever since the incorporation of the plaintiff, Ball Engineering Company, said P. D. C. Ball has been the president and a director of said Ball Engineering Company, and the holder and owner of 498 out of the 500 shares of stock of said company. On the 2nd day of April, 1910, said P. D. C. Ball was the owner of the personal property described in the complaint, and on said day executed and delivered to the plaintiff, Ball Engineering Company, an instrument, a copy whereof is hereto annexed and by reference made a part hereof, marked "Plaintiff's Exhibit C," whereby said P. D. C. Ball sold and delivered to said Ball Engineering Company, among other things, all of the property described in the complaint, and in "Plaintiff's Exhibit A," a copy of which is hereto annexed, whereby said property had been theretofore sold by one George A. Carden to said P. D. C. Ball. Said property was then situated upon land belonging to the United States, known as the site of Lock and Dam No. 6, on the Trinity River, in County of Dallas, in the State of Texas.

4. On the 10th day of July, 1906, the United States entered into a contract with the Hubbard Building & Realty Company, a corporation organized under the laws of the State of Texas, whereby said Company agreed to construct lock and dam No. 6 in accordance with the plans and specification forming a part of said agreement,
25 which agreement, marked "Defendant's Exhibit 8," a copy of which is hereto annexed and by reference made a part hereof.

5. In or about the year 1905, a partnership was formed by and between George A. Carden of Dallas, Texas, and P. D. C. Ball of St. Louis, Missouri, which was known as the "Ball Carden Company;" during the twelve months prior to September, 1909, said partnership purchased the property enumerated in paragraph 3 of the complaint herein; the great majority thereof was new when placed on the site of said lock and dam, and all of said property was purchased with moneys furnished by said P. D. C. Ball; said property was placed by said copartnership at the site of said lock and dam No. 6 and was thereafter and until in or about the month of May, 1909, used by said copartnership in the construction of said lock and dam.

6. The said Hubbard Building & Realty Company having failed to complete the construction of said lock and dam within the period of time limited by the contract between the said Hubbard Building & Realty Company and the United States, on or about the 21st day of August, 1908, an application was made in the name of the said Hub-

bard Building & Realty Company by the said George A. Carden as president of said company for an extension of the time for the completion of said lock and dam until eight months from September 1, 1908. Said extension of time so requested was granted by the United States Government. The said lock and dam not having been completed prior to May 1, 1909, on or about May 29, 1909, a request for a further extension was made by a letter dated May 29, 1909, signed in the name of the Hubbard Building & Realty Company by said George A. Carden as president of that company. Said further extension was granted by the Government of the United States.

26 7. In April or May, 1909, said partnership was dissolved, and discontinued the work theretofore carried on by it in the construction of said lock and dam No. 6. On or about the 24th day of July, 1909, said George A. Carden executed and delivered to said P. D. C. Ball an instrument, a copy whereof is hereto annexed and by reference made a part hereof, being "Plaintiff's Exhibit A" as marked in evidence herein, whereby said George A. Carden sold and delivered to said P. D. C. Ball all of his right, title and interest in and to all of the personal property of every kind and description, including material, machinery and appliances, belonging to the said partnership between the said George A. Carden and the said P. D. C. Ball, known as the "Ball-Carden Company," used in connection with or located at or near lock and dam No. 6, then in process of construction by the United States Government at Trinity River below Dallas, Texas, in the County of Dallas, said property being the same described in paragraph "3" of the complaint herein.

8. After the dissolution of the said copartnership between said George A. Carden and said P. D. C. Ball, and until on or about September 8, 1909, said P. D. C. Ball, operating under the name of the "Ball Engineering Company," continued the work of constructing the said lock and dam No. 6, using for that purpose the said property referred to in said paragraph "3" of the complaint herein, sold to him as aforesaid by said George A. Carden.

9. From about June 1, 1909, until the incorporation of the plaintiff, Ball Engineering Company, one Oscar Shanks was the personal representative at the site of said lock and dam No. 6 of said P. D. C. Ball, doing business under the name of "Ball Engineering Company," and was the general superintendent of said P. D. C.

27 Ball at the site of the said lock and dam No. 6 and as such representative and superintendent was in charge of the construction work upon said lock and dam No. 6 from on or about June 1, 1909, until on or about September 8, 1909, at which time said work ceased.

10. During the period when said Shanks was present at the site of said lock and dam No. 6, and in charge of the work of constructing said lock and dam, as aforesaid, he saw, and had in his possession, the plans and specifications contained in "Defendant's Exhibit 8," hereinbefore referred to, which were turned over to him by his predecessor. During said period said Shanks, from time to time, discussed such portions of said specifications (as were necessary) in the construction of the work with Captain A. E. Waldron, the engineer officer of the United States Government in charge of the work of constructing said lock and dam, and said Shanks carried on the work of

constructing said lock and dam, as aforesaid, under the direction of said P. D. C. Ball. No portion of the property mentioned in the complaint was brought upon the work after the arrival of Mr. Shanks at lock and dam No. 6.

11. On September 9, 1909, work upon said lock and dam No. 6 was abandoned. On October 22, 1909, notification of the annulment of said contract pursuant to its provisions was given to the Hubbard Building & Realty Company by letter of that date signed by A. E. Waldron, Captain Corps Engineers, U. S. A., a copy whereof is hereto annexed and by reference made a part hereof, marked "Defendant's Exhibit 17."

12. On dates beginning January 4, 1909, and ending September 8, 1909, ten checks were issued and signed by A. E. Waldron, Captain Corps Engineers, U. S. A., payable to the order of the said Hubbard Building & Realty Company in payment of vouchers issued in favor of said Hubbard Building & Realty Company approved
28 by said Captain A. E. Waldron for work done and material furnished on said lock and dam No. 6, Trinity River, Texas, and each of said checks bore the endorsements "Hubbard Building & Realty Company by George A. Carden, President" and "Pay to the Order of National Bank of Commerce, P. D. C. Ball;" the only variations from such endorsements being on one of said checks dated January 4, 1909, whereon the endorsements were as follows: "Hubbard Building & Realty Company by George A. Carden, President;" and "P. D. C. Ball." Each of said checks bore on its face the following statement: "State object for which drawn," under which the following further statement appeared on each of said checks: "Constructing Lock and Dam No. 6, Trinity River, Texas." Ten other checks were issued and signed, five by W. P. Wooten, Captain Corps of Engineers, U. S. A., and five by Captain A. E. Waldron, Corps of Engineers, U. S. A., dated respectively on dates beginning December 7, 1907, and ending August 7, 1909, payable to the order of the Hubbard Building & Realty Company, in payment of vouchers issued in favor of the Hubbard Building & Realty Company, five of which were approved by said Captain W. P. Wooten, and five by said Captain A. E. Waldron, for work done and material furnished on lock and dam No. 6, Trinity River, Texas. Each of said last mentioned ten checks bore the following endorsement: "Hubbard Building & Realty Company by George A. Carden, President." Another check was issued, signed by Captain W. P. Wooten, Corps of Engineers, U. S. A., dated November 18, 1907, and payable to the order of the Hubbard Building & Realty Company, in payment of a voucher issued in favor of the Hubbard Building & Realty Company, and approved by said Captain W. P. Wooten, for work done and material furnished on lock and dam No. 6, Trinity River, Texas. Said
29 last mentioned check bore the following endorsements: "Hubbard Building & Realty Company, G. E. White, Secty." and "The Southern Trading Company, G. E. White, V. Pt." All of the above mentioned checks bore upon their face the following statement: "State object for which drawn," under which the following further statement appears on each of said checks, "Constructing lock and dam No. 6, Trinity River, Texas."

13. After the time of the incorporation of the plaintiff, Ball En-

gineering Company, the said Oscar Shanks was in the employ of said company and was representative and superintendent of said company at the site of the work on said lock and dam No. 6, and also at locks and dams Nos. 2 and 4, on the said Trinity River.

14. It did not appear under what circumstances either the plaintiff or said P. D. C. Ball, operating under the name of the Ball Engineering Company, undertook to perform said work or furnish said material, nor did it appear under what circumstances said Ball-Carden Company entered upon said work, other than that this was done without the actual knowledge of said P. D. C. Ball, who did not learn thereof until two or three months later.

15. Pursuant to advertisement dated April 30, 1910, a contract, dated May 18, 1910, and approved June 6, 1910, was entered into between the United States and the defendant for the completion of lock and dam No. 6. On May 18, 1910, the original contract was forwarded by the defendant to Captain A. E. Waldron, with a letter of even date, a copy of which, marked "Defendant's Exhibit 20" is annexed hereto and by reference made a part hereof. A copy of this said agreement, marked "Exhibit 21" is annexed hereto and by reference made a part hereof.

16. On April 16th, 1910, and on March 16th, 1910, re-
30 spectively, the plaintiff sent to said Captain A. E. Waldron two letters, copies of which are hereto annexed, marked "Defendant's Exhibits 5 and 6" and by reference made a part hereof. On April 28th, 1910, said Waldron sent to the plaintiff a letter, of which a copy is hereto annexed, marked "Defendant's Exhibit 18," and by Reference made a part hereof. Prior to the making of said contract, one F. G. Ward and one E. G. Williams, employees of the defendant, attempted, in behalf of the defendant, without success, to agree with the plaintiff for the purchase or rental of the personal property and materials specified in the complaint, and on June 8, 1910, a notice, signed in the name of said P. D. C. Ball, by Oscar Shanks, was sent to the defendant, stating that said property did not belong to the Hubbard Building and Realty Company but that it was the personal property of said P. D. C. Ball, a copy whereof is hereto annexed, marked "Defendant's Exhibits 1 and 2."

17. On June 6, 1910, Captain A. E. Waldron, United States Engineer, in charge of said work, notified by letter the Hubbard Building & Realty Company that the defendant had requested the United States to take the articles of personal property specified in the complaint, and a portion of the materials, pursuant to the provisions of the contract with the Hubbard Building & Realty Company, and that they "are taken possession of under the provisions of paragraph 33 of the original specifications which form a part of the contract," and requested that the remainder of said material be removed within thirty days. A copy of this notification was sent to the plaintiff. A copy of said letter, marked "Defendant's Exhibit 22" is hereto annexed and by reference made a part hereof. A letter was sent on June 6th, 1910, by said Captain Waldron to the defendant a copy of which, marked "Defendant's Exhibit 23" is hereto annexed
31 and by reference made a part hereof. On June 9th, 1910, a letter was written by R. C. Snead, Assistant Government En-

gineer, to Mr. P. D. C. Ball, a copy of which letter, marked "Defendant's Exhibit 24" is hereto annexed, and by reference made a part hereof.

18. On said June 6, 1910, Captain Waldron notified the defendant of the action taken by him, and stated: "The fact that the material and machinery is on the Government reservation or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the locksite, is sufficient to assume that the Government has taken possession of the items you speak of at the present time. They are therefore turned over to you under the conditions contained in Insert E, following paragraph 38 of the specifications for the construction of lock and dam No. 6, Trinity River, Texas, for use in further work on lock and dam No. 6, Trinity River, Texas."

19. On June 22, 1910, Captain A. E. Waldron, the engineer officer in charge, notified the defendant that the Hubbard Building & Realty Company, had been directed to remove all property at said lock and dam No. 6, except that specified in said letter, and determined the valuation of said property at the sum of $11,578, and fixed a monthly rental of $380 therefor from the government to the defendant. He also fixed a valuation upon the materials at the locksite and notified the defendant to take such of them as it deemed proper, at such valuations respectively.

20. The plaintiff refused to assent to either valuation.

21. On July 18, 1910, the defendant receipted to the United States government for the articles constituting said plant, and for such of the materials as it was willing to and did receive. A form of receipt was sent by Captain Waldron to the defendant on June 22nd,
32 1910, with a letter, a copy of which, marked "Defendant's Exhibit 25" is annexed hereto and by reference made a part hereof.

22. On August 5, 1910, Captain Waldron notified the Hubbard Building & Realty Company and Mr. P. D. C. Ball that of the materials on hand the defendant had taken 13,120 lineal feet of round piling, 10,768 of sheet piling, and 9,552 feet of Wakefield piling; 480 bolts, with washers ¾ x 12; 1,100 lbs. nails; 50 cords of wood; 22 foot gauges for piers; 8 capstan levers; 8 friction roller arms; 8 journal boxes for dam; 8 cast gate anchors; 52 cast journals upon which articles, exclusive of the piling, a valuation of $570 had been placed by him, and notified said Company and said Ball to remove the balance within thirty days. It did not appear that the balance was ever removed. The total valuation assessed by Captain Waldron upon the material taken by the defendant and incorporated in the work was $2,640.96.

23. On June 22, 1910, Captain A. E. Waldron forwarded to the defendant a memorandum invoice and receipt for the articles constituting the plant, and for such of the materials as the defendant was willing to and did receive, and on July 18, 1910, the defendant signed and delivered to the United States government a receipt for said plant and material theretofore turned over to it by said Captain A. E. Waldron, as aforesaid.

24. On or about July 6, 1910, the defendant commenced work on lock and dam No. 6, and made use of the property belonging to the

plaintiff and described in the complaint, with the exception of 1,382 feet of round piling, 252 feet of sheet piling ready to drive, and 928 feet of sheet piling 12 x 12 ready to drive, and paid to the United States a rental of $380 per month, or was credited therewith, for use of the plant.

25. On or before the completion of said lock and dam No.
33 6, by the defendant, the property, other than materials taken and used by the defendant, was returned to the United States, and by it offered to the Hubbard Building & Realty Company and to said Ball, neither of whom accepted said property.

26. The United States neither paid, credited nor tendered either purchase price or rental of said property to the plaintiff or to the Hubbard Building & Realty Company, except that in the final account between the United States and the Hubbard Building & Realty Company, after the completion of the work, the United States gave credit to the Hubbard Building & Realty Company for the value of said personal property and materials at the valuation determined by the engineer officer in charge. After the deduction of this credit, a balance was by the account shown to be due from the Hubbard Building & Realty Company to the United States.

27. The United States tendered to the Hubbard Building & Realty Company from time to time certain articles which the defendant no longer needed. On November 10, 1910, a letter was written by A. E. Waldron, Captain Corps of Engineers, to the Hubbard Building & Realty Company, a copy of which is hereto annexed, marked "Plaintiff's Exhibit D," and upon the completion of the work a letter, dated January 30, 1911, marked "Plaintiff's Exhibit E," a copy whereof is hereto annexed, was written by Captain A. E. Waldron to the said Hubbard Building & Realty Company, whereby an offer was made to relinquish to said Hubbard Building & Realty Company certain items of said personal property therein described. This offer was never accepted, and no part of said personal property was removed from the site of lock and dam No. 6, either by the plaintiff or by the Hubbard Building & Realty Company.

34 28. Thereafter the Chief of Engineers of the United States Army by telegram dated Washington, D. C., February 3, 1911, directed to said Captain A. E. Waldron, a copy whereof is hereto annexed and marked "Defendant's Exhibit 30," instructed said Captain Waldron to withdraw his said letter of January 30, 1911, to the Hubbard Building & Realty Company and to retain possession of all of said personal property until further advised by the office of said Chief of Engineers.

29. Thereafter and on February 3, 1911, said Captain A. E. Waldron wrote a letter to the Hubbard Building & Realty Company, a copy whereof is hereto annexed and marked "Defendant's Exhibit 32," wherein it was stated that said Waldron was in receipt of telegraphic instructions from the Chief of Engineers at Washington directing that he withdraw his said letter of January 30, 1911, to the Hubbard Building & Realty Company and retain possession of all said plant until further advised by said Chief of Engineers, and a copy of said letter was sent to the said Chief of Engineers of the United States Army, to said P. D. C. Ball and to the defendant.

30. On February 3, 1911, said Waldron also wrote a letter to John

Ehrhardt, United States inspector upon the work on lock and dam No. 6, a copy of which is hereto annexed and marked "Defendant's Exhibit 33," wherein said Waldron stated that in view of the instructions from the Chief of Engineers said Ehrhardt should under no circumstances allow the Hubbard Building & Realty Company or any other claimant to take possession of any item of property or machinery at said lock and dam No. 6.

31. After the return of said property by the defendant to the United States Government the said property remained at the site of said lock and dam No. 6 in the possession of the United States Government.

35 32. In the accounts between the United States and the Hubbard Building & Realty Company kept at the office of the Engineer of the United States at Dallas, Texas, entries were first made by employees of the United States crediting to the Hubbard Building & Realty Company the same rental which was charged against the defendant for the use of said property, but thereafter and after the receipt by said Waldron of the telegram of February 8, 1911—"Defendant's Exhibit 30"—a copy whereof is hereto annexed, said credits of said rental were canceled and the said Hubbard Building & Realty Company was credited with the valuation of said property determined by the Engineer officer in charge.

The following conclusions have been reached, so as to conform to the said decision of the Honorable Circuit Court of Appeals:

1. That on or about the sixth day of June, 1910, the Government of the United States, under the circumstances and in the manner hereinbefore set forth, took possession of the personal property described in the complaint, with the exception of the following articles: 1,382 feet of round piles; 252 feet of sheet piling ready to drive; and 928 feet of sheet piling 12 x 12 ready to drive, and on or about July 6th, 1910, delivered the same to the defendant, which took possession of and used the same.

2. That on the sixth day of July, 1910, the fair market value of said property so taken at the site of Lock and Dam No. 6 was $15,000.

3. That paragraph 33 of the specifications, forming a part of the agreement with the Hubbard Building & Realty Company, approved July 28th, 1906, which reads as follows:

"33. Annulment.—In case of the annulment of this con-
36 tract as conditionally provided for in the form of contract adopted and in use by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge;"

does not, as a matter of law, authorize the United States to purchase materials, tools, etc., belonging to a third party, in the absence of agreement of the owner to assent to the provisions of Paragraph 33.

4. That said paragraph 33 does not authorize the United States to purchase materials, tools, etc., prepared for use in or use in the prose-

cution of the work save on payment to the owner thereof at a valuation to be determined by the Engineer Officer in charge.

5. That said paragraph 33 does not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon payment of a rental value to be determined by the Engineer Officer in charge, and the United States did not acquire any title to or right to the possession of said property by virtue of paragraph 33.

6. That the Government of the United States took title to said property as sovereign, and on or about the sixth day of July, 1910, leased said property to the defendant, and the defendant took possession thereof and thereafter used the same, but was not guilty of conversion by reason thereof.

7. That judgment ought to be rendered in favor of the defendant.

Respectfully submitted,

GEORGE D. WATROUS,
Committee.

New Haven 26th day of April, 1916.

37 PLAINTIFF'S EXHIBIT C.

M. W. C., Mar. 6, 1913.

Know all men by these presents, That I, P. D. C. Ball, of the City of St. Louis, State of Missouri, in consideration of Fifty Thousand Dollars ($50,000.00) to me paid by Ball Engineering Company (a corporation organized under the laws of the State of Missouri, and doing business in the City of St. Louis and State of Missouri), the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell, Convey, Transfer and Deliver unto the said Ball Engineering Company, the following property located in Dallas, Kauffman and Ellis Counties, in the State of Texas, to-wit:

A certain narrow-gauge railroad and all spurs and connections consisting of 20-pound rails, spikes, fish-plates, bolts, ties, frogs, switches, culverts, cattle guards, grade, and all bridges including the bridge across Parson's Slough, and the right-of-way in connection therewith, said railroad commencing at Kleburg, in Dallas County, State of Texas, and extending to Lock and Dam No. 2 on the Trinity River and adjacent thereto, and consisting of approximately 7½ miles of railroad track and the aforesaid appurtenances thereto; together with approximately 8,000 more or less ties piled up along the aforesaid railroad track.

A certain narrow-gauge railroad in Kauffman and Ellis Counties, State of Texas, together with all spurs and connections therewith, consisting of 16-pound rails, spikes, fish-plates, bolts, ties, frogs, switches, turntables, grade, cattle guards, right-of-way, and all adjuncts and appurtenances thereto, said railroad commencing at Lock and Dam No. 6 on the Trinity River and extending to a certain gravel pit and consisting approximately of 3 miles of railroad track.

A certain suspension bridge, tracks thereon and all appurtenances

thereto crossing the Trinity River at Lock and Dam No. 6
38 in Kauffman and Ellis Counties, State of Texas.

Gravel Bins at Lock No. 6, and gravel bins, towers, screens and appurtenances at gravel pit near Lock and Dam No. 6.

1 Narrow-gauge Locomotive and all appurtenances thereto; 2 Narrow-gauge Flat Cars; 12 Narrow-gauge 3-yard Dump Cars; 1 Narrow-gauge Gasoline Hand Car; 15 Koppel Steel Dump Cars; 14 Western Dump Cars; 1 Gasoline Engine with rotary Gravel Screen complete, with gravel bins and appurtenances on the Glenn Farm; 2 Lidgewood Cableways complete with engines, towers, cables, ropes, travellers, wheels and axles, rails, spikes, fish-plates and ties, boilers and all appurtenances thereto; 2 Steel Derricks complete with sheaves, bull wheels, tackle, rope and all appurtenances thereto; 2 — 9" x 12" Triple Drum, double-cylinder Carlin Engines complete with swinging gear and appurtenances; 1 — 40 H. P. 8½" x 12" Double-Cylinder Flory Triple Drum Engine with swinging gear; 1 — 16 H. P. 6¼" x 8" Double-Cylinder Flory Side Stand Engine No. 88; 2 — Double-Drum Double-Cylinder Reliance Engines with 2 — 30 H. P. Boilers complete and all appurtenances thereto; 1 — Double-Drum Engine; 1 — Blakeslee Gas Engine; 2 — 40 H. P. Horizontal Fire Box Boilers with all appurtenances thereto; 3 — 30 H. P. Horizontal Fire Box Boilers with all appurtenances thereto; 1 — 30 H. P. Vertical Boiler with all appurtenances thereto; 1 — Saw Mill and Engine complete at Lock and Dam No. 2; 1 — Saw Mill and Engine complete at Lock and Dam No. 4; 6 — Smithvale Water Pumps 8" x 5" x 10"; 2 — 4" Centrifugal Pumps; 2 — Small Duplex Pumps; 1 — 10" x 16" Pump Engine; 1 — Small Vertical Engine; 1 — No. 5 Smith Concrete Mixer with en-
39 gine complete, and all appurtenances thereto; 2 — Bartlett Steam Pile Driver Hammers, complete with hose, connections and appurtenances thereto; 1 — 2,800-pound Drop Hammer; 1 — 2,000-pound Drop Hammer; 4 Pairs of Pile Driver Leads complete for Drop and Steam Hammers; 2 — Pairs of Swinging Pile Driver Leads complete for Drop and Steam Hammers; 1 — Buick Automobile; 1 — H. P. Road Roller at Grand Prairie, Texas; 20 — Mules, 4 — Log Wagons; 3 — Farm Wagons; 2 — Buggies; together with all equipment, machinery, pipes, iron, steel, cement, lumber, piling, bolts, nails, spikes, tools and appliances in the aforesaid counties and at Locks and Dams No. 2, 4 and 6 on Trinity River aforesaid, also all repair and hand tools, blacksmith shop equipment, camp equipment, bunk houses, office buildings, office equipment including typewriters, books, desks, tables, chairs, cupboards, files and all other property and things which may be regarded as a part of or appurtenant to the aforesaid property herein conveyed, located in said Dallas, Ellis and Kauffman Counties in the State of Texas;

To have and to hold all and singular, the aforesaid property to the said Ball Engineering Company and its successors and assigns, to its and their own use and behoof forever.

And I hereby covenant with the said grantee that I am the lawful owner of the said property; that it is free from all encumbrances; that I have good right to sell the same as aforesaid, and that I will warrant and defend the same against the lawful claims and demands of all persons.

In witness whereof, I, the said P. D. C. Ball hereunto set my hand and seal this second day of April, 1910.

(Signed) P. D. C. BALL.

Attest,

(Signed) S. T. SWARTZ.

40 STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of April, 1910, before me personally appeared P. D. C. Ball, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at my office in the City of St. Louis, the day and year first above written.

My commission expires Jan. 6, 1912.

[SEAL.] A. G. LATIMER,
Notary Public, City of St. Louis, Missouri.

Plaintiff's Exhibit A.

PLAINTIFF'S EXHIBIT A.

M. W. C., Mar. 6, 1913.

Know all men by these presents, That I, the undersigned, George A. Carden, of the City of Dallas, State of Texas, in consideration of the sum of One Dollar ($1.00) to me paid by P. D. C. Ball, of the City of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for other good and valuable considerations, receipt of which is hereby acknowledged, hereby sell, assign, set over and deliver unto the said P. D. C. Ball, all of my right, title and interest in and to all of the personal property of every kind and description, including material, machinery, and appliances, belonging to the partnership of Ball-Carden Company, used in connection with or located at or near Lock and Dam No. 6 now in process of construction by the United States Government at Trinity River below Dallas,
41 Texas, being in the County of Dallas, State of Texas.

Witness, my hand this 24th day of July, 1909.

(Signed) GEORGE A. CARDEN.

Attest:

(Signed) F. LEE WILLIAMS.

DEFENDANT'S EXHIBIT 8.

M. W. C., Mar. 10, 1913.

Form 19*a*.

Authorized April 30, 1896.

With Amendments to April 15, 1902.

Articles of Agreement.

Entered into July 10, 1906 between Captain W. P. Wooten, Corps of Engineers, U. S. Army, of the one part, and Hubbard Building & Realty Co., of the other part, for constructing Lock and Dam No. 6, Trinity River, Texas. 19 bps. attached.

Advertisements, Instructions, Specifications, Proposals, etc., for Improving Trinity River, Texas. Construction of Lock and Dam No. 6.

Advertisement.

United States Engineer Office.

Federal Building.

DALLAS, TEXAS, April 12, 1906.

Sealed proposals for building lock and dam No. 6 on Trin-
42 ity River, Texas, will be received here until 12 M., May 28, 1906, and then publicly opened. Information furnished on application.

W. P. WOOTEN,
Capt. Engrs.

Specifications.

General Instructions for Bidders.

1. The attention of bidders is especially invited to the Acts of Congress approved February 26, 1885, and February 23, 1887, as printed in Vol. 23, page 332, and Vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed in these instructions.

4. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office.

5. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a Judge or clerk of a United States Court, United States District Attorney, United States Commissioner, or Judge or clerk of a State court of record, with the seal of said court attached.

6. A firm as such will not be accepted as surety, nor a part-
43 ner for a copartner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

7. When the principal, a guarantor, or a surety is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

8. Each guarantor will justify in a sum of ten thousand dollars ($10,000.00). The liability of the guarantors and bidder is determined by the Act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder and post-office address, with county and State, must be given after his signature.

11. All prices must be written as well as expressed in figures.

44 12. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or

addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and when reached, it shall be handed to him or his authorized agent, unread.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for lock and dam No. 6, to be opened May 28, 1906," and inclosed in another sealed envelope addressed to Captain W. P. Wooten, Corps of Engineers, but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the guaranties given are approximately only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon to do so, evidence satisfactory to the Engineer Officer in charge of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of not less than twenty-five per cent. of the amount of the contract, within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposin gto put in bids. Parties making bids are to be understood as

accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

24. Bidders are invited to be present at the opening of the bids.

General Conditions.

25. A copy of the advertisement, and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

29. The decision of the Engineer Officer in charge as to quality and quantity shall be final.

30. Payments will be made monthly, except when otherwise herein specified, on estimates of results accomplished during the preceding month. A percentage of ten (10) per centum will be reserved
47 from each payment until the completion of the contract. Except where otherwise herein specified, all payments will be made on the basis of actual net quantities as measured and accepted in final place. (See Par. 35.)

31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it not later than September 1, 1908. (See Par. 35.)

32. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered, into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due to the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the

judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other
48 abnormal force or violence of the elements, or by epidemics, local or state quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army; Provided, further, that if — any time it is apparent that the contractor cannot complete the work in the specified time, or shall refuse or fail to prosecute the work vigorously, or to provide for carrying on the same as directed, the United States reserves the right to enter upon the work, purchase such material and supply such labor at the expense of the contractor as may be necessary to put the work in a proper state of advancement. Provided, further, that if the contractor fails in any one month to do four per cent. of the work, as derived from the statement of approximate quantities forming part of the specifications, such failure may be taken as a sufficient cause for the annulment of this contract, or for other action under the provisions of these specifications unless such failure is caused by freshets, or other unforeseeable causes of delay as set forth above.

33. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry
49 privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge.

34. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

35. Work Proposed.—The work proposed under these specifications is to be done under the provisions of Act of Congress approved March 3, 1905, which contemplates the construction of locks and dams on the Trinity River, Texas. It includes the construction of lock and dam No. 6, with abutment, crib work, bank protection, and the providing and setting of trestles, lock-gates, and all other parts necessary to complete and put the structures in proper operation, all in accordance with the drawings and these specifications.

There is now available for this work, including office expenses and superintendence, about $105,000. It is believed that, in accordance with the provisions of the above-mentioned act, Congress will at its present session appropriate additional funds sufficient to complete the work covered by these specifications, but there is no guaranty of this and the contractor must assume all risk of exhaustion of funds. Each bidder will be required to state in his proposal whether he will agree to prosecute the work continuously, so as to complete it within the time named in paragraph 31, or whether he will suspend work in

case the funds available for payments to the contractor become exhausted.

In making award the right is reserved to select the alternative deemed most advantageous to the United States.

If the first method is adopted, the United States will make
50 payments immediately after funds have become available if all the conditions of these specifications have been fulfilled.

If the second method is adopted, the date of suspension will be fixed by the Engineer Officer in charge and the contractor will be required to resume work within 30 days after notification that funds are again available for payments.

If the work is suspended for lack of funds, additional time for completion will be allowed equivalent to the time during which the work is so suspended.

36. Site.—The site for lock No. 6 is about forty-two miles below Dallas by river, and about eight miles by road from switch on the T. M. R. R.

All this section of the river has been cleared of snags, but the stages of water are usually low and navigation is uncertain.

37. Physical Characteristics.—The surrounding country is heavily timbered. Open-air work can be carried on nearly all the year, and although ice sometimes forms during the winter, the cold is rarely severe enough to prevent such work as the laying of concrete. Rises in the river are liable to occur at any time, but come chiefly during the Spring months, and severe floods, which are of occasional occurrence, spread over the bottoms. Usually the river does not overflow its banks.

38. Drawings and Specifications.—The location, dimensions, and general construction shall be as shown on the drawings exhibited. Additional drawings will be furnished as needed. All drawings exhibited and furnished to illustrate the work shall form part of these specifications. Any error, discrepancy or point not clearly understood either in drawings or specifications shall be referred for decision to the Engineer Officer in charge, and shall not be made a ground for claim against the United States.

51 39. Supervision.—The work shall be conducted in strict accordance with the instructions of the Engineer Officer in charge. Any work done in disobedience to his instructions will not be paid for. The order of the work shall be subject to his approval. The contractor shall personally superintend the work during its progress or have it personally superintended by a competent and responsible representative duly accredited as such to this office. Any incompetent, insubordinate, disorderly, or objectionable employee of the contractor shall be dismissed from the work if required by the Engineer Officer in charge and not be re-employed. Such discharge shall not form the basis of any claim for compensation or damage upon the United States or any of its agents.

40. Inspection.—The United States will employ one or more inspectors on the work. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors and for the Engineer Officer in charge and his agent to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly fur-

nished by the contractor without expense to the United States. Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required, furnish suitable board and lodging to such employees of the United States as are connected with the work, at not to exceed fifteen dollars per month for each employee, to be paid for by the United States with the monthly payments.

41. Injury to Work.—The United States will not be responsible for the safety of the contractor's employees, plant or materials, nor for any damage done by or to them from any source or cause, and damages caused by the contractor or his employees to any portion of the Government work shall at once be properly repaired
52 by the contractor, at his own expense. If the contractor does not at once repair such damages the United States may repair the same, and the entire cost of doing so will be deducted from the monthly payments due or to become due the contractor. Any injury to work or loss of material, whether in cofferdams, concrete, or any other part of the construction, which may occur before the completion of the contract, from natural causes and without fault or negligence or delay on the part of the contractor, will be repaired or restored by the contractor at contract prices at the expense of the United States, and shall be paid for when possible under the unit prices of this contract, and when not so possible shall be paid for as specified in the clause "Extras and Changes." When the injury or loss, or where injury, loss or disfigurement of any kind is due to fault, negligence or delay on the contractor's part, the damage shall be made good by him to the satisfaction of the Engineer Officer, at contractor's expense. All the work contracted for must be placed in final working order to the satisfaction of the Engineer Officer in charge, before final payment is made. Acceptance or approval of, or payment for, any part of the work shall not release the contractor from the obligation to guard and to keep that part in good order and condition, and to repair at his own expense any defects that may develop in it, when such defects are due to faulty material or workmanship supplied by him, until the completion and final acceptance of the work as a whole.

42. Use of U. S. Grounds.—The contractors, during the progress of the work, will have the privilege of using such portions of the Government land on both sides of the river at the site, for storage purposes, temporary buildings, etc., as are not otherwise used or reserved by the United States. It is understood, however, that
53 the contractor shall, at any time during the progress of the work, promptly vacate and clean up any part of the Government land that may have been allotted to him, or be in use by him, whenever it is needed by the United States.

43. Time of Work.—Work shall generally be done between sunrise and sunset. Work at night, on Sundays, or on national holidays will not be permitted, except by authority of the Engineer Officer in charge. Should necessity arise for carrying on work at night, on Sundays, or national holidays, this shall be done by the contractor to the extent directed by the Engineer Officer in charge.

44. Stakes and Templates.—The lines and levels for the work having been given on the ground by the Engineer Officer in charge, the contractor must conform and keep thereto, and all stakes and

benches, after being placed, must be kept in position by the contractor without cost to the United States. The contractor shall furnish, at his own expense, the stakes required to lay out the work, as well as the labor required to place them or to remove them to other positions when so directed. He will also be required to furnish, without cost to the United States, all templates, and platforms, on the ground or elevated, that may be required at any time in building or laying out any part of the work.

45. Furnishing Labor.—The contractor shall furnish, upon request of the Engineer Officer in charge, any labor needed to do occasional work, skilled or unskilled, which may be needed by the United States, in connection with this work. For skilled labor so supplied, the contractor shall receive thirty cents per hour per man, and for unskilled labor fifteen cents per hour per man. Any labor or material (other than surveying instruments and special apparatus) required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other
54 matters connected with the work, shall be furnished by the contractor at cost price and will be paid for by the United States with the monthly payments, except where the contractor is herein specifically requested to furnish such services, materials, etc., at his own expense. Where the cost of extra work or material can, in the opinion of the Engineer Officer in charge, be paid for on the basis of the unit price of the contract, these unit prices shall be used.

46. Complete Work.—The contractor is not to take advantage of any omission of details in drawings or specifications, or errors in either, but he will be required to do everything which may be necessary to carry out in good faith the contract, which contemplates everything complete, in good working order, of good material, with accurate workmanship, skillfully fitted and properly connected and put together. He must supply all materials and labor, all bolts, machinery, supplies, tools, cement and other sheds, quarters and such other plant, parts or structures as may be needed temporarily or permanently in order to complete the work according to the true intent of the contract.

47. Extras and Changes.—If it should become necessary to do any work or make purchases not covered by the unit prices of this contract, the contractor shall furnish the same at the current rates existing at the time of said purchase or work; said current rates to be determined by the Engineer Officer in charge, and approved by the Chief of Engineers, and payment therefor to be made with the monthly payments. In all other cases where material changes from the specifications are deemed necessary, or for the interest of the Government by the Engineer Officer in charge, such changes, including the price for same, shall be agreed upon by the contracting parties beforehand in writing, and approved by the Secretary of
55 War. But minor changes that involve no material increase in cost shall be made by the contractor, without additional compensation, whenever directed by the Engineer Officer in charge.

48. Rubbish to be Removed.—Within thirty days after the completion of the work, and before final payment is made, the contractor shall remove from the site all rubbish, old or unused materials, etc., and shall fill up any excavation made for his convenience, as the

Engineer Officer in charge may direct, and shall leave the whole in good order and satisfactory condition without expense to the United States.

Form 19*a*.

1. This agreement entered into this Tenth day of July, nineteen hundred and six between Captain W. P. Wooten, Corps of Engineers, United States Army, of the first part, and Hubbard Building & Realty Co. of Dallas in the county of Dallas, State of Texas, of the second part, Witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Captain W. P. Wooten, Corps of Engineers, U. S. Army, for and in behalf of the United States of America, and the said Hubbard Building & Realty Co., do covenant and agree, to and with each other, as follows:

The said party of the second part agrees to construct Lock and Dam No. 6 in Section One of the Trinity River, Texas, in accordance with the plans and specifications hereunto attached, which form a part of this contract, and under the second method, as outlined in paragraph 35 of the specifications, at the unit prices given below, viz.:

	Grubbing and clearing at One hundred dollars per acre	($100.00)
	Excavation at Forty cents per cubic yard	($ .40)
56	Round timber at Thirty cents per lineal foot	($ .30)
	Round piles at Fifty cents per lineal foot	($ .50)
	Brush at Ten dollars per cord	($ 10.00)
	Concrete at Seven dollars and fifty cents per cubic yard	($ 7.50)
	Boule gates at Fifty dollars per M feet board measure	($ 50.00)
	Oak timber at Five cents per foot board measure	($ .05)
	Timber in permanent work at Fifty dollars per M feet B. M.	($ 50.00)
	Timber in cribs at Fifty dollars per M feet board measure	($ 50.00)
	Riprap at Five dollars per cubic yard	($ 5.00)
	Iron and steel at Six and one-half cents per pound	($ .06½)
	Steel re-inforcing rods at Seven cents per pound	($ .07)
	Chain at Seven and one-half cents per pound	($ .07½)
	Drift bolts at Five cents per pound	($ .05)
	Sheet piling at Fifty dollars per M feet board measure	($ 50.00)
	Sheet piling, steel at Seventy-five cents per square foot	($ .75)
	Plain filling at Thirty cents per cubic yard	($ .30)
	Compacted filling at Forty cents per cubic yard	($ .40)
	Riprap paving at Forty cents per square foot	($ .40)
	Paving on spalls at Fifty cents per square foot	($ .50)
	Paving in concrete at Fifty cents per square foot	($ .50)
57	Paving for cribs at Twenty cents per square foot	($ .20)
	Sand bags at Ten cents each	($ .10)
	Gauges at Fifty cents per lineal foot	($ .50)
	Crab, crane and service car at Twenty-five cents per pound	($ .25)
	Frames with rollers at Two dollars each	($ 2.00)
	Drains under lock floor at Fifty cents per lineal foot	($ .50)

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 31 & 35 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become
58 due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the material, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first
59 part and deducted from any payments due or to become due the party of the second part; Provided, however, that the party of the first part may, with the prior sanction of the Chief of

Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the party of the second part as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be trans-

ferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any
61 breach of this contract by said Hubbard Building & Realty Co. are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

EDWARD CULVER, as to

W. P. WOOTEN,
Captain, Corps of Engineers, U. S. A.

A. F. SLATER, as to

HUBBARD BUILDING & REALTY CO.,
As to per J. A. HUBBARD,
President.

(Executed in triplicate.)

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

Approved, July 28, 1906.

62 War Department,

United States Engineer Office,

Federal Building,

Dallas, Texas.

"DEFENDANT'S EXHIBIT 17."

Sten. M. W. C. Mar. 10, 1913.

OCTOBER 22, 1909.

Hubbard Building & Realty Company, Mr. George A. Carden, President, Dallas, Texas.

GENTLEMEN: In that the Hubbard Building & Realty Company, contractor for the construction of lock and dam No. 6 on the Trinity River, Texas, has not performed any work of actual construction since September 9, 1909, and has shown no indication, either by written notice, or otherwise, that it intends to prosecute the work to the finish, and this after divers extensions in time had been granted the said Hubbard Building & Realty Company for its convenience:

And in that paragraph 4 of contract entered into the 10th day of July, 1906 by and Between Captain W. P. Wooten, Corps of Engineers, U. S. Army, party of the first part, and Hubbard Building & Realty Company, party of the second part, which contract was approved by Brigadier General A. Mackenzie, Chief of Engineers, July 28, 1906, reads in part: "If, in any event, the party of the second part * * * shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then * * * the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the
63 party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease * * * *."

Therefore, with the prior sanction of the Chief of Engineers, I do hereby annul the above-mentioned contract, and no further payments under said contract will be made by this office.

Very respectfully,

A. E. WALDRON,
Captain Corps of Engineers.

A. E. W./b.

"DEFENDANT'S EXHIBIT 20."

J. G. White & Company, Incorporated,

Engineers Contractors,

43-49 Exchange Place, New York, N. Y.

Correspondents:

J. G. White & Company, Limited, 9 Cloak Lane, London E. C.
Waring & White (1906) Limited 1 A Cockspur St., London, England.

Cable Address:

Whitemoth, New York.

Codes Used:

Liebers A. B. C. 4th Ed'n.
Bedford McNeil A. 1.
Western Union.

NEW YORK, May 18, 1910.

Capt. A. E. Waldron, Corps U. S. Engineers, Federal Bldg., Dallas, Texas.

DEAR SIR: Re Trinity River.

We hand you herewith contract dated May 18, 1910, in triplicate, executed by us, for the completion of Lock and Dam No. 6, Trinity River, Texas, and Contractor's Bond, in triplicate, fully executed.

When you return our fully executed copy of this contract
64 will you kindly send us six copies of the Advertisement and printed Specifications in the form originally dated April 12, 1906, seven copies of form No. 19 Articles of Agreement, and seven copies of Form J Contractor's Bond. These printed Specifications and forms are reqired by us to make up for our files and for distribution to various of our departments interested copies of the agreement, etc.

As we are desirous of starting construction work promptly, we would ask that upon request of either our construction superintendent, Mr. F. W. Ward, or our construction manager, Mr. E. G. Williams, who will visit you and the site of the work shortly, en route from California to the East, under the provisions of insert E, to follow paragraph 38, and of paragraph 33 of the specifications, you take possession of any of the materials, tools, buildings, tramways, cars, etc., prepared for use or in use in the prosecution of the work by the Hubbard Building & Realty Company, and any of the leases, rights of way or quarry privileges in the possession of said Hubbard Building & Realty Company at the time of annulment of their contract, and turn over to us for our use in carrying out our agreement with the United States any such materials, tools, buildings, tramways, cars, etc., and leases, rights of way or quarry privileges, of which you may take possession. It is the intention of this request that our construction superintendent or our construction manager shall select such of the materials, tools, etc., as may be required and request you to take possession accordingly of only what is required and will be of service to us in carrying out our contract.

Yours very truly,

J. G. WHITE & COMPANY, INC.,
WM. McM. NORTH,
Construction Department.

G. W. B./J. F. B.

Encs.

65 *Advertisement.*

"DEFENDANT'S EXHIBIT 21."

Sten. M. W. C., Mar. 10, 1913.

United States Engineer Office,

Federal Building,

DALLAS, TEXAS, April 30, 1910.

Sealed proposals for completing lock and dam No. 6 on Trinity River, Texas, will be received here until 12 M., May 10, 1910, and then publicly opened. Information furnished on application.

A. E. WALDRON,
Capt. Eng'rs.

work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

69 22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of not less than twenty-five per cent. of the amount of the contract, within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum name in the bond.

24. Bidders are invited to be present at the opening of the bids.

General Conditions.

25. A copy of the advertisement, and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

70 29. The decision of the Engineer Officer in charge as to quality and quantity shall be final

30. Payments will be made monthly, except when otherwise herein specified, on estimates of results accomplished during the preceding month. A percentage of ten (10) per centum will be reserved from each payment until the completion of the contract. Except where otherwise herein specified, all payments will be made on the basis of actual net quantities as measured and accepted in final place. (See Par. 35.)

31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it not later than June 1, 1911. (See Par. 35.)

32. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion

by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due to the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time
71 limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army: Provided, further, that if — any time it is apparent that the contractor cannot complete the work in the specified time, or shall refuse or fail to prosecute the work vigorously, or to provide for carrying on the same as directed, the United States reserves the right to enter upon the work, purchase such material and supply such labor at the expense of the contractor as may be necessary to put the work in a proper state of advancement. Provided, further, that if the contractor fails in any one month to do four per cent. of the work, as derived from the statement of approximate quantities forming part of the specifications, such failure may be taken as a sufficient cause for the annulment of this contract, or for other action under the provisions of these specifications unless such failure is caused by freshets, or other unforeseeable causes of delay as set forth above.

33. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be,
72 and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge.

34. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

35. Work Proposed.—The work proposed under these specifica-

tions is to be done under the provisions of Act of Congress approved March 3, 1905, which contemplates the construction of locks and dams on the Trinity River, Texas. It includes the completion of lock and dam No. 6, with abutment, crib, work, bank protection, and the providing and setting of trestles, lock-gates, and all other parts necessary to complete and put the structures in proper operation, all in accordance with the drawings and these specifications.

The construction of the lock and dam was begun under contract dated July 10, 1906, with the Hubbard Building & Realty Company and was prosecuted under this contract and agreements supplementary thereto until September, 1909, when the contractor abandoned the work then approximately half completed. The contract with the Hubbard Building & Realty Company was annulled October 22, 1909, and it is the intent of these specifications, and of the contract to be entered into thereunder, to provide for the completion of the work undertaken by the Hubbard Building & Realty Company without change or modification of any kind that could not have been made under the original contract with that company, and no provision or provisions herein shall be construed to nullify such intention.

73 Present Condition of the Work.—Both the land and river walls are completed with the exception of placing the gate anchors; the ladders on the river wall are yet to be placed in the recesses provided for them; the capstans and snubbing posts are in place; about one thousand cubic yards of earth will have to be excavated before the construction of the lock floor can be commenced; the upper and lower land cribs are filled with riprap and stones cut for paving the same; the crib below the abutment is completed except the paving; the line of protection piles below the crib abutment has been placed; and 173 cubic yards of concrete have been placed in the abutment proper. About 250 piles have been driven of those required under the lock floor and dam.

36. Site.—The site for lock No. 6 is about forty-two miles below Dallas by river, and about eight miles by road from switch on the T. M. R. R.

All this section of the river has been cleared of snags, but the stages of water are usually low and navigation is uncertain.

37. Physical Characteristics.—The surrounding country is heavily timbered. Open-air work can be carried on nearly all the year, and although ice sometimes forms during the winter, the cold is rarely severe enough to prevent such work as the laying of concrete. Rises in the river are liable to occur at any time, but come chiefly during the spring months, and severe floods, which are of occasional occurrence, spread over the bottoms. Usually the river does not overflow its banks.

38. Drawings and Specifications.—The location, dimensions, and general construction shall be as shown on the drawings exhibited. Additional drawings will be furnished as needed. All drawings exhibited and furnished to illustrate the work shall form part

74 of these specifications. Any error, descrepancy or point not clearly understood either in drawings or specifications shall be referred for decision to the Engineer Officer in charge, and shall not be made a ground for claim against the United States.

(*a*) The drawings referred to in paragraph 38 are listed and described as follows:

Sheet.	Index No.	Title.
1	Y2/70	Survey of Site of Lock No. 6.
2	Y2/71	General Plan and Elevations of Lock and Cribs.
3	Y2/72	Foundation Plan, Sections and Elevations.
4	Y2/74	Sections and Elevations of Lock Walls and Crib.
5	Y2/75	General Plan, Pile Plan and Sections of Dam.
6	Y2/77	Plan Elevations and Sections of Abutment.
7	Y2/76	General Plans, Elevations and Sections of Dam, Pier Drift Chute and Abutment.
8	Y2/79	Details of Trestle for Dam.
9	Y2/78	Details of Boulé Gates and Fittings for Dam.
10	Y1/17	Details of Crab for Dams Nos. 1 and 6.
11	Y1/21	Crane and Service Car for Dams Nos. 1 and 6.
12	Y1/12	General Drawings of Lock Gates, Locks Nos. 1 and 6.
13	Y1/13	Fittings for Lock Gates, Locks Nos. 1 and 6.
14	Y1/14	Details of Valves, Fittings and Railings of Gates, Locks Nos. 1 and 6.
75		
15	Y1/15	Fittings for Locks and Gates, Locks Nos. 1 and 6.
16	Y2/73	Location of Capstans and Gate Anchorage (Lock No. 6).
17	Y1/18	Details of Iron Work for River Wall, Drift Chute and Abutment Locks Nos. 1 and 6.
18	Y1/19	Details of Capstans and Coffer Beam-Casting, Locks Nos. 1 and 6.
19	Y1/20	Details of Coffer Beam for Locks.

(*b*) There is at the lock site approximately the following invoice of plant and material left at the site of the work by the defaulting contractor, the Hubbard Building & Realty Company:

Article.	Designation.	Total on hand.	Serviceable.	Unserviceable.
Anvils	No.	2	1	1
Boilers, 40 h. p. with fittings	"	2	2	..
Buckets, orange peel	"	1	1	..
Buckets, concrete, 1 yd	"	2	2	..
Blocks, assorted	"	8	8	..
Bowls, sugar	"	2	2	..
Cars, western dump, 1½ yd	"	10	10	..
Cars, Arthur Kopple Co., 1 yd., all iron	"	15	10	5
Concrete mixer, Smith's make, 1 yd.	"	1	1	..
Cleavers	"	2	2	..
Cups	"	27	27	..

Article.	Designation.	Total on hand.	Serviceable.	Unserviceable.
Derricks, cottonwood mast and boom with rigging, i. e., guy ropes, etc.	"	3	3	..
Derricks, 90 ft. steel mast, 75 ft. steel boom, with rigging complete	"	1	..	..
Drill press	"	1	1	..
76				
Desk, writing, 3 x 6 ft., 3 drawers	No.	1	1	..
Engines, hoisting, 3 drum	"	3	3	..
Engines, hoisting, 2 drum	"	3	3	..
Engines, traction	"	1	..	1
Forge	"	1	1	..
Forks, table	"	37	37	..
Grindstone	"	1	1	..
Hammers, steam	"	1	..	1
Hoes	"	2	2	..
Jack Screw	"	1	1	..
Knives, table	"	36	36	..
Knives, butcher	"	2	2	..
Ladles, Soup	"	5	5	..
Pumps, Smith-Vale, 2" discharge	"	1	1	..
Pumps, Smith-Vale, 3" discharge	"	1	..	1
Pumps, 1½" discharge	No.	1	1	..
Pans, wash	"	1	1	..
Pans, bread	"	6	6	..
Pans, assorted	"	42	42	..
Pans, dish	"	2	2	..
Pots, coffee	"	4	4	..
Pots, stew	"	3	3	..
Plates, assorted	"	38	38	..
Pitchers, small size	"	6	6	..
Picks, 45 without handles	"	63	63	..
Planer, small size	"	1	1	..
Pipe, steam line, 3 in	Ft.	600	600	..
Pipe, steam and water, 2"	"	294	294	..
Ranges, 6 hole	No.	2	2	..
Rope, manila	Lbs.	300	..	300
Saw mill, mangle and carriage	No.	1	..	1
Spoons, table	"	44	44	..
Spoons, tea	"	24	24	..
Skillets	"	2	2	..
Saw, meat	"	1	1	..
Saucers	"	12	12	..

77

Article.	Designation.	Total on hand.	Serviceable.	Unserviceable.
Sieve	No.	1	1	..
Shovels	"	10	10	..
Spades	"	17	17	..
Spike maul	"	1	1	..
Vise	"	1	1	..
Water tank, cypress, cap. 600 gal. (about)	"	1	1	..

Quarter Facilities.

1 cement shed	25 x 52
1 blacksmith shop	18 x 25
1 material house	14 x 30
1 bunk house	20 x 30
(This house 2 story.)	
Dining room or mess hall	15 x 48
Kitchen and commissary	15 x 48
Office building	16 x 20
Bunk house	18 x 26
Bunk house	30 x 30
Bunk house	17 x 30

Some 4 or 5 tents, cots and bedding which are hard to classify, as they could be used in some weather, but would be of little use in cold weather.

All of the above named houses are what is known as "Box" houses, some covered with shingles and some with tar paper, except the dining-room, which is walled up half way and screened the other, with canvas covering.

Tramway, 16 lb. steel, 11,407 ft. track.
Tramway, 20 lb. steel, 281 ft. track.
Single rail, loose, 86 lin. ft.
Forms, already assembled, 4 about 20 x 25 ft.
Lumber, native, mostly oak, about third class, 1,579 ft. B. M.
Lumber, pine, about third class, 403 ft. B. M.
One cable bridge, 2" cable, 350 lin. ft.

78 All articles mentioned on this list are in good condition at this time.

Round Piles.

Number.	Length.	Lin. ft.
3	12	36
23	14	322
58	15	870
5	16	80
44	17	748
191	18	3,438
14	20	280
59	19	1,121
7	21	147
68	22	1,496
43	23	989
178	24	4,272
25	25	625
3	26	78
721		14,502 lin. ft.

Sheet Piling 4 x 12.

Number.	Length.	Ft. B. M.
89	25	8,900
17	26	1,768
2	20	160
2	24	192
110		11,020 ft. B. M.

Sheet Piling, Bolted and Ready for Use, 12 x 12, Called Wakefield.

Number.	Length.	Ft. B. M.
11	22	2,904
2	20	480
16	24	4,608
8	26	2,496
37		10,488 ft. B. M.

79	Bolts and washers for same ¾ x 12 in....	No.		480
	Cement	"	sacks	745
Nails		"	lbs.	1,100
Oil, kerosene		"	gals.	50
Wood		"	cords	50
Gauges for pier.....		"	ft.	22
Capstan levers		"		8
Friction roller arms		"		8
Journal boxes for dam		"		8
Cast gate anchors		"		8
Cast journals		"		52
Bolts with washers, 12" long.....		"		480

¾ in. cables, guys and hoisting, on derricks, lin. ft., 2,049.
⅝ in. cables, guys and hoisting, on derricks, lin. ft., 3,948.
1 in. cables, guys and hoisting, on derricks, lin. ft., 3,425.

If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake
80 to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.

39. Supervision.—The work shall be conducted in strict accordance with the instructions of the Engineer Officer in charge. Any work done in disobedience to his instructions will not be paid for. The order of the work shall be subject to his approval. The contractor shall personally superintend the work during its progress or have it personally superintended by a competent and responsible representative duly accredited as such to this office. Any incompetent, insubordinate, disorderly, or objectionable employee of the contractor shall be dismissed from the work if required by the Engineer Officer in charge and not be re-employed. Such discharge shall not form the basis of any claim for compensation or damage upon the United States or any of its agents.

40. Inspection.—The United States will employ one or more inspectors on the work. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors and for the Engineer Officer in charge and his agent to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly furnished by the contractor without expense to the United States. Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required, furnish suitable board and lodging to such employees of the United States as are connected
81 with the work, at not to exceed fifteen dollars per month for each employee, to be paid for by the United States with the monthly payments.

41. Injury to Work.—The United States will not be responsible for the safety of the contractor's employees, plant or materials, nor for any damage done by or to them from any source or cause, and damages caused by the contractor or his employees to any portion of the Government work shall at once be properly repaired by the contractor, at his own expense. If the contractor does not at once repair such damages the United States may repair the same, and the entire cost of doing so will be deducted from the monthly payments due or

to become due the contractor. Any injury to work or loss of material, whether in cofferdams, concrete, or any other part of the construction, which may occur before the completion of the contract, from natural causes and without fault or negligence or delay on the part of the contractor, will be repaired or restored by the contractor at contract prices at the expense of the United States, and shall be paid for when possible under the unit prices of this contract, and when not so possible shall be paid for as specified in the clause "Extras and Changes." When the injury or loss, or where injury, loss or disfigurement of any kind is due to fault, negligence or delay on the contractor's part, the damage shall be made good by him to the satisfaction of the Engineer Officer, at contractor's expense. All the work contracted for must be placed in final working order to the satisfaction of the Engineer Officer in charge, before final payment is made. Acceptance or approval of, or payment for, any part of the work shall not release the contractor from the obligation to guard and to keep that part in good order and condition, and to repair at his own expense any defects that may develop in it, when such defects are due to faulty material or workmanship supplied by
82 him, until the completion and final acceptance of the work as a whole.

42. Use of U. S. Grounds.—The contractor, during the progress of the work, will have the privilege of using such portions of the Government land on both sides of the river at the site, for storage purposes, temporary buildings, etc., as are not otherwise used or reserved by the United States. It is understood, however, that the contractor shall, at any time during the progress of the work, promptly vacate and clean up any part of the Government land that may have been allotted to him, or be in use by him, whenever it is needed by the United States.

43. Time of Work.—Work shall generally be done between sunrise and sunset. Work at night, on Sundays, or on national holidays will not be permitted, except by authority of the Engineer Officer in charge. Should necessity arise for carrying on work at night, on Sundays, or on national holidays, this shall be done by the contractor to the extent directed by the Engineer Officer in charge.

44. Stakes and Templates.—The lines and levels for the work having been given on the ground by the Engineer Officer in charge, the contractor must conform and keep thereto, and all stakes and benches, after being placed, must be kept in position by the contractor without cost to the United States. The contractor shall furnish, at his own expense, the stakes required to lay out the work, as well as the labor required to place them or to remove them to other positions when so directed. He will also be required to furnish, without cost to the United States, all templates, and platforms, on the ground or elevated, that may be required at any time in building or laying out any part of the work.

45. Furnishing Labor.—The contractor shall furnish, upon
83 request of the Engineer Officer in charge, any labor needed to do occasional work, skilled or unskilled, which may be needed by the United States, in connection with this work. For skilled labor so supplied, the contractor shall receive thirty cents per hour per man, and for unskilled labor fifteen cents per hour per man. Any

labor or material (other than surveying instruments and special apparatus) required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other matters connected with the work, shall be furnished by the contractor at cost price and will be paid for by the United States with the monthly payments, except where the contractor is herein specifically required to furnish such services, materials, etc., at his own expense. Where the cost of extra work or material can, in the opinion of the Engineer Officer in charge, be paid for on the basis of the unit price of the contract, these unit prices shall be used.

46. Complete Work.—The contractor is not to take advantage of any omission of details in drawings or specifications, or errors in either, but he will be required to do everything which may be necessary to carry out in good faith the contract, which contemplates everything complete, in good working order, of good material, with accurate workmanship, skilfully fitted and properly connected and put together. He must supply all materials and labor, all bolts, machinery, supplies, tools, cement and other sheds, quarters and such other plant, parts or structures as may be needed temporarily or permanently in order to complete the work according to the true intent of the contract.

47. Extras and Changes.—If it should become necessary to do any work or make purchases not covered by the unit prices of this contract, the contractor shall furnish the same at the current rates existing at the time of said purchase or work; said current rates to
84 be determined by the Engineer Officer in charge, and approved by the Chief of Engineers, and payment therefor to be made with the monthly payments. In all other cases where material changes from the specifications are deemed necessary, or for the interest of the Government by the Engineer Officer in charge, such changes, including the price for same, shall be agreed upon by the contracting parties beforehand in writing, and approved by the Secretary of War. But minor changes that involve no material increase in cost shall be made by the contractor, without additional compensation, whenever directed by the Engineer Officer in charge.

48. Rubbish to be Removed.—Within thirty days after the completion of the work, and before final payment is made, the contractor shall remove from the site all rubbish, old or unused material, etc., and shall fill up any excavation made for his convenience, as the Engineer Officer in charge may direct, and shall leave the whole in good order and satisfactory condition without expense to the United States.

52. Construction.—The cofferdams shall be placed and constructed as directed by the Engineer. They shall consist of two rows of three inch by twelve inch sheet piling, securely driven into hard clay, and properly secured to six inch by six inch stringers running horizontally with not more than five foot centers. The stringers to be fastened to round piling spaced six foot centers, and securely driven in the river bed. All to be properly bolted together, forming a cofferdam eight feet wide outside dimensions. The cofferdam to be filled with selected earth to be tamped when directed. A plank sluice of

approved construction shall be built in the cofferdams at the lower end, closed with plank needles.

85 56. Payment.—All excavated material used for cofferdam will be paid for as excavation only, no additional payment will be allowed for placing it in the cofferdams. Those portions which are ordered to be removed, as specified in paragraph 54, shall be again paid for at the full unit price for excavation, unless the materials are used again, when they shall be paid for as specified in the same paragraph. Piles driven shall be paid for as round piles. Timber in cofferdams, sluices, etc., will be paid for as timber in cribs. Iron tie rods will be paid for as iron and steel. For tamping of earth the necessary labor shall be furnished at cost price.

Form 19.

1. These Articles of Agreement entered into this 18th day of May, nineteen hundred and ten, between Captain A. E. Waldron, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and J. G. White & Co., Inc., ... of ....., in the county of ....., State of Connecticut, hereinafter designated as the contractor, of the second part, Witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

2. In conformity with the advertisement and specifications hereunto attached (wherever the term "Engineer Officer in charge" is used in the specifications, it shall be understood to refer to the "contracting officer." The interlineations, the erasures, and the inserts appearing in the specifications hereunto attached, have been made prior to the signing of these articles of agreement), and the drawings referred to in paragraph 38 of the specifications, which form a part of this contract, the said contractor shall furnish all material

86 and labor necessary to complete Lock and Dam No. 6, Trinity River, Texas, and shall complete said lock and Dam No. 6, Trinity River, Texas, as outlined in paragraph 35 of these specifications, at the unit price given below, viz.:

Excavation at seventy-five cents ($0.75) per cubic yard.
Round timber, at sixteen cents ($0.16) per lineal foot.
Round piles at thirty-seven cents ($0.37) per lineal foot.
Brush at nine dollars and ninety-eight cents ($9.98) per cord.
Concrete at eleven dollars ($11.00) per cubic yard.
Boule gates at eighty dollars ($80.00) per M ft. board measure.
Oak timber at fifteen cents ($0.15) per foot board measure.
Timber in permanent work at seventy-five dollars ($75.00) per M ft. board measure.
Timber in cribs at forty-six dollars ($46.00) per M ft. board measure.
Riprap at five dollars and seventy-five cents ($5.75) per cubic yard.
Iron and steel at nine cents ($0.09) per pound.
Steel reinforcing rods at seven cents ($0.07) per pound.
Chain at nine cents ($0.09) per pound.

Drift bolts at six cents ($0.06) per pound.
Sheet piling at seventy-two dollars ($72.00) per M ft. board measure.
Sheet piling, steel, at one dollar and fifty cents ($1.50) per square foot.
Plain filling, at thirty cents ($0.30) per cubic yard.
Compacted filling, at fifty cents ($0.50) per cubic yard.
Riprap paving at twenty-seven cents ($0.27) per square foot.
Paving on spalls at thirty-two cents ($0.32) per square foot.
87 Paving in concrete at thirty-five cents ($0.35) per square foot.
Paving for cribs, at thirty-six and one-half cents ($0.36½) per square foot.
Sand bags, at ten cents ($0.10) each.
Gauges at three dollars ($3.00) per lineal foot.
Crab, crane and service car, at twenty-five cents ($0.25) per pound.
Frames with rollers, at five dollars ($5.00) each.
Drains under lock floor at fifty-five cents ($0.55) per lineal foot.
Payments to be made in the manner set forth in paragraph 30 of the specifications.

3. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

4. The contractor shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 35 of the attached specifications.

5. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall in the judgment of the contracting officer fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case the contracting officer shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the contractor, and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due there-
88 under shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the contractor whatever sum may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the contractor; and the contracting officer may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the contracting officer

shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

6. If the contractor shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the contracting officer may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the original time limit be thus waived, all expenses for inspection and superintendence, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: Provided, however, That no charge for inspection
89 and superintendence shall be made for such period after the date of expiration of this contract, as in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from commencing or completing the work or delivering the material within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time and remission of charges shall in no manner affect the rights or obligations of the parties under this contract.

7. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed
90 and approved before the obligation arising from such modification was incurred.

8. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the con-

tracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

9. The contractor shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

11. The contractor shall hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

12. Payments shall be made to the contractor as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

13. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with
91 the transferrer or the transferee, but all rights of action for any breach of this contract by the said contractor are reserved to the United States.

14. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.* But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

15. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

16. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

† 17. No mechanic or laborer employed on the work herein specified will be permitted or required by the contractor to work more than eight hours in any one calendar day except in case of extraordinary emergency.

‡ 18. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

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*Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract."—See Sec. 3740, Revised Statutes.

† Cancel this paragraph in contracts to which the eight-hour law does not apply.

‡ When used for emergency contracts cancel this paragraph.

92 In Witness Whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

Witnesses:

(Signed) J. H. ETHERIDGE,

As to A. E. WALDRON,

Captain, Corps of Engineers, U. S. Army.

Attest:

H. S. COLLETTE,

As to J. G. WHITE & CO., INC.,

By J. G. WHITE,

President.

[SEAL.] —— ——,

Secretary.

(Executed in triplicate.)

Approved June 6th 1910.

(Signed) W. L. MARSHALL,

Brig. Gen., Chief of Engineers, U. S. Army.

DEFENDANT'S EXHIBIT 5.

Ball Engineering Company,

P. De C. Ball, President.

Engineers and Contractors.

DALLAS, TEXAS, April 16th, 1910.

Capt. A. E. Waldron, Corps of Engineers, U. S. A., Dallas, Texas.

DEAR SIR: On March 19th we addressed a letter to you relative to certain boilers, engines, cars, etc, now at lock No. 6, all the personal property of Mr. P. D. C. Ball and asked that you take up this matter with the Chief of Engineers so that Mr. Ball could learn of the theory on which the government refuses to turn over this property to him.

93 We have heard nothing from you and would appreciate an early reply.

Yours truly,

BALL ENGINEERING CO.,

By OSCAR SHANKS.

DEFENDANT'S EXHIBIT 6.

P. De C. Ball, M. Am. Soc. M. E.
James P. Ball, Oscar Shanks, M. Am. Soc. C. E.

Ball Engineering Company,

P. De C. Ball, Proprietor.

Engineers and Contractors.

DALLAS, TEXAS, March 16, 1910.

Capt. A. E. Waldron, Corps of Engineers, U. S. A., Dallas, Texas.

DEAR SIR: There is now at lock No. 6, and has been since last September, in addition to the various boilers, hoisting engines, pile drivers, cars, tracks, etc.

1,481 sacks of cement
733 Round Piles
1,093 feet B. M. form lumber
11,004 feet B. M. Wakefield piling made up
11,052 feet B. M. Wakefield piling not made up
5,468 lbs. cast and wrought iron

all the personal property of Mr. P. D. C. Ball. The attention has heretofore been called a number of times to the fact that this property belongs to Mr. Ball. It can be used to advantage in the construction of work at Locks Nos. 2 and 4. The property has been deteriorating in value and will continue to deteriorate, some of it being of a perishable nature.

94 We would esteem it a great favor if you would again take up this matter with the Chief of Engineers, so that Mr. Ball can learn of the theory on which the Government refuses to turn over this property to him.

Yours very truly,

BALL ENGINEERING CO.,
By OSCAR SHANKS.

"DEFENDANT'S EXHIBIT 18."

War Department,

United States Engineer Office,

Federal Building,

DALLAS, TEXAS, April 28, 1910.

Ball Engineering Company, Dallas, Texas.

GENTLEMEN: I have to advise you that your letter of March 16, 1910 relative to certain property now at the site of Lock & Dam

No. 6, Trinity River, Texas, and claimed by Mr. Ball to be his personal property, was forwarded to the Chief of Engineers March 17th, and returned under date of April 25th, bearing indorsement reading as follows:

"1. Respectfully returned to Captain Waldron, who is authorized to inform the writer and other persons interested, that the Department is proceeding on the assumption that the title to the property is in the Hubbard Building & Realty Company, the contractor for the construction of lock 6, and that the United States has the right, under paragraph 33 of the specifications forming part of the
95 contract, to take possession of all or part thereof, under purchase at a valuation to be determined by the Engineer Officer in charge. It is not yet certain whether or not the United States will elect to exercise this right. If the right is exercised, the contractor will be allowed credit for the fair value of the plant and materials, in final settlement; if the right is not exercised, the property will be turned over to the contractor's representative.

2. The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using *it* on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value.

3. If the owners of the property can come to a satisfactory agreement with the contractors who are to complete the work, for the rental of the plant, and the purchase of the materials, it is probable that the United States will not attempt to exercise the right to purchase the property under paragraph 33 of the specifications.

4. If efforts are made, through action in the courts, or otherwise, to remove the property, this office should be promptly advised, in order that the Department of Justice may be requested to instruct the United States District Attorney to take charge of the defense."

The above information is deemed a reply to your letter of March 16, 1910.

Very respectfully,

A. E. WALDRON,
Captain Corps of Engineers.

96 Ball Engineering Company,

P. De C. Ball, President.

Engineers and Contractors.

DALLAS, TEXAS, June 8, 1910.

J. G. White Co., Ferris, Texas.

"DEFENDANT'S EXHIBIT 1."

M. W. C. Mar. 6, 1913.

GENTLEMEN: We beg to enclose a copy of our letter to Captain A. E. Waldron, Corps of Engineers, U. S. Army, Dallas, Texas, which is self explanatory.

Yours very truly,

P. D. C. BALL,
By OSCAR SHANKS.

June 8, 1910.

Captain A. E. Waldron, Corps of Engineers, U. S. A., Dallas, Texas.

"DEFENDANT'S EXHIBIT 2."

M. W. C. Mar. 6, 1913.

DEAR SIR: We beg to acknowledge the receipt of a copy of your letter to the Hubbard Building and Realty Co. and note that the J. G. White Co., the party who has the contract for the completion of Lock & Dam No. 6, Trinity River, Texas, has requested that the United States take possession of certain machinery, tools, materials, etc., in accordance with paragraph 33 of the original specifications, and which are now at the lock site, and also note that the conditions under which the Government proposes to take possession are given in "Insert E" following paragraph 33 of the specifications for
97 completion of Lock and Dam No. 6, Trinity River, Texas.

The property in question does not belong to the Hubbard Building & Realty Co., but is the personal property of Mr. P. D. C. Ball and Mr. Ball does not agree, nor consent to the use of any of his property, until a satisfactory arrangement has been made with the Government or the J. G. White Co. as to the purchase price of the material and the rental value of the plant as may be needed by the Government, and protests against either the J. G. White Co., or the U. S. Government taking any manner of possession of any of the property until Mr. Ball is paid for it.

In accordance with your request, Mr. Ball will remove his property within the next thirty days.

Yours very truly,

P. D. C. BALL,
By OSCAR SHANKS.

C. St. L.
J. G. W. Co.

"DEFENDANT'S EXHIBIT 22."

War Department,

United States Engineer Office,

Federal Building,

DALLAS, TEXAS, June 6, 1910.

Hubbard Building & Realty Co., Mr. George A. Carden, President, Dallas, Texas.

GENTLEMEN: J. G. White & Co., Inc., the party who has contract for the completion of lock and dam No. 6, Trinity River,
98 Texas, has requested that the United States take possession of the following items, formerly used in the prosecution of your contract (now annulled) for the construction of said lock and dam No. 6:

All leases, rights of way or quarry privileges held by the Hubbard Building & Realty Co. in connection with this work included under this contract, including leased houses, leases of ground upon which houses or other structures have been constructed outside the Government boundary, rights of way for tracks, tramways, pipelines, etc., together with the sand and gravel quarry located about one and one-half miles from the work.

The detailed list of plant, equipment, material and buildings required is as follows:

1—anvil
2—40 H. P. boilers with fittings
1—orange peel bucket
2—1 yd. bottom dump concrete buckets
10—1½ yd. Western Dump Cars
10—Koppell 1 yard cars
1—1 yard Smith Concrete Mixer
1—Derrick, cottonwood mast and broom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall
1—Derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables
1—Drill Press
3—3-Drum Hoisting Engines
1—Forge
1—Grindstone
1—Steam Hammer with Leads
1—Jack Screw
1—Smith-Vaile Pump, 2" discharge
1—Smith-Vaile Pump, 3" discharge
1—Pump, 1½" discharge
1—3" Steam Pipe Line 600 ft. long
1—2" Steam and Water Pipe line 294 ft. long
99 1—Vise
1—600 gallon Cypress Water Tank

3—Crosscut Saws
Blacksmith's blower and small tools
1—Cement Shed
1—Blacksmith Shop
1—Material House
1—2-story Bunk House
1—Mess Room
1—Kitchen and Commissary
1—Office Building
3—Bunk Houses
1—Tramway, 16 lb. steel, 11,407 ft. of track
1—Tramway, 20 lb. steel, 281 ft. of track
86—lineal ft. loose rail
1—Suspension Bridge 350 ft. span

Round Piles.

As applying to the accompanying list of round and sheet piling, we note that some of this has apparently been injured by exposure to the wind and sun without proper protection. We request that possession be taken only of such material as is satisfactory to the Government for incorporation in the work.

	Number.	Length.	Lineal feet.
	3	12	36
	23	13	322
	58	15	870
	5	16	80
	44	17	748
	191	16	3,438
	14	20	280
100	59	19	1,121
	7	21	147
	66	22	1,496
	43	23	989
	178	24	4,272
	25	25	625
	3	26	78
	721		14,502

Sheet Piling 4 x 12.

Number.	Length.	Ft. B. M.
89	25	8,900
17	26	1,760
2	20	160
2	24	192
110		11,020 ft. B. M.

Wakefield Sheet Piling, Bolted and Ready for Use, 12 x 12.

Number.	Length.	Ft. B. M.
11	22	2,904
2	20	480
16	24	4,608
8	26	2,496
37		10,488

480—Bolts with washers ¾ x 12
1,100—lbs. Nails
50—cords of wood
22—ft. gauges for pier
8—Capstan Levers
8—Friction Roller Arms
101 8—Journal Boxes for Dam
8—Cast Gate Anchors
52—Cast Journals
1—Still for Water
1—set Derrick Fittings

These are taken possession of under the provisions of paragraph 33 of the original specifications, which form part of the contract. The conditions under which the Government takes possession are given in Insert "E" following paragraph 38 of the specifications for the completion of Lock and Dam No. 6, Trinity River, Texas, which reads:

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in Charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

102 Due to other business which requires my attention for the next two weeks, it will be impossible for me to place a fair rental value on the items of plant and a fair purchase value on such materials as are used, much before the end of the present month.

You are hereby informed that such other property and materials

as you have at lock and dam No. 6, Trinity River, Texas, not quoted above, neither the government nor the contractor desires to take possession of. You are therefore requested to remove the same, or give notice of its abandonment within the next thirty days.

Very respectfully,

A. E. WALDRON,
Captain Corps of Engineers.

A. E. W./b.

Copy of this letter sent to:
Ball Engineering Co., Dallas, Texas.
United Surety Co. of Maryland, Baltimore, Md.
Mr. E. G. Williams, Construction Manager for J. G. White & Co., Inc., c/o The Southland Hotel, Dallas, Texas.
Mr. John Erhardt, U. S. Inspector.

"DEFENDANT'S EXHIBIT 23."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, June 6, 1910.

Mr. E. G. Williams, Construction Manager, for J. G. White & Co., Inc., Southland Hotel, Dallas, Texas.

SIR: Your letter of to-day's date in which you request the Government to take possession of certain items of machinery and material, as well as leases, rights-of-way, etc., has been received .

103 Inclosed herewith is a copy of letter addressed to Hubbard Building & Realty Company, Mr. Geo. A. Carden, President, which shows the action I have taken in this matter. A copy of this letter will be sent to Mr. P. D. C. Ball at the Ball Engineering Company, who claims ownership of most of the machinery and material at the locksite.

The fact that the material and machinery is on the Government reservation, or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the locksite, is sufficient to assume that the Government has possession of the items you speak of, at the present time. They are therefore turned over to you under the conditions contained in Insert "E" following paragraph 38 of the specifications for the construction of Lock and Dam No. 6, Trinity River, Texas, for use in further work on lock and dam No. 6, Trinity River, Texas.

Very respectfully,

A. E. WALDRON,
Captain Corps of Engineers.

1 inclo.—copy of letter. A. E. W./b.

"DEFENDANT'S EXHIBIT 24."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, June 9, 1910.

Mr. P. D. C. Ball, c/o Ball Engineering Company, Dallas, Texas.

SIR: I am in receipt of your letter of June 8th, referring to a copy of a letter from this office of June 6th written to Hub-
104 bard Building & Realty Company, Mr. George A. Carden, President, in reference to the Government taking possession of certain property at lock and dam No. 6, Trinity River, Texas.

You say: "The property in question does not belong to the Hubbard Building & Realty Co., but is the personal property of Mr. P. D. C. Ball * * *," etc., and: "In accordance with your request, Mr. Ball will remove his property within the next thirty days." Your attention is again invited to the items set out below, these items being also listed in the copy of letter of June 6th:

"All leases, rights of way or quarry privileges held by the Hubbard Building & Realty Co. in connection with this work included under this contract, including leased houses, leases of ground upon which houses or other structures have been constructed outside the Government boundary, rights of way for tracks, tramways, pipe lines, etc., together with the sand and gravel quarry located about one and one-half miles from the work.

The detailed list of plant, equipment, material and buildings required is as follows:

1—anvil
2—40 H. P. boilers with fittings
1—orange peel bucket
2—1 yd. bottom dump concrete buckets
10—1½ yd. Western Dump Cars
10—Koppell 1 yard cars
1—1 yard Smith Concrete Mixer
1—Derrick, cottonwood mast and boom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall
1—Derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables
105 1—Drill Press
3—3-drum Hoisting Engines
1—Forge
1—Grindstone
1—Steam Hammer with leads
1—Jack Screw
1—Smith-Vaile Pump, 2" discharge
1—Smith-Vaille Pump, 3" discharge
1—Pump, 1½" discharge

1—3" Steam Pipe Line 600 ft. long
1—2" Steam and Water Pipe line 294 ft. long
1—Vise
1—600 gallon Cypress Water Tank
3—Crosscut Saws
Blacksmith's blower and small tools
1—Cement Shed
1—Blacksmith's Shop
1—Material House
1—2 Story Bunk House
1—Mess Room
1—Kitchen and Commissary
1—Office Building
3—Bunk Houses
1—Tramway, 16 lb. steel, 11,407 ft. of track
1—Tramway, 20 lb. steel, 281 ft. of track
86—lineal ft. loose rail
1—Suspension Bridge 350 ft. span

Round Piles.

"As applying to the accompanying list of round and sheet piling, we note that some of this has apparently been injured by exposure to the wind and sun without proper protection. We request that possession be taken only on such material as is satisfactory to the Government for incorporation in the work:

106

Number.	Length.	Lineal feet.
3	12	36
23	14	322
58	15	870
5	16	80
44	17	748
191	16	3,438
14	20	280
59	19	1,121
7	21	147
66	22	1,496
43	23	989
178	24	4,272
25	25	625
3	26	78
721		14,502

Sheet Piling 4 x 12.

Number.	Length.	Ft. B. M.
89	25	8,900
17	26	1,760
2	20	160
2	24	192
110		11,020 ft. B. M.

Wakefield Sheet Piling, Bolted and Ready for Use, 12 x 12.

Number.	Length.	Ft. B. M.
11	22	2,904
2	20	480
16	24	4,608
8	26	2,496
37		10,488 ft. B. M.

107 480—Bolts with washers ¾ x 12
1,100—lbs. Nails
50—cords of wood
22—ft. gauges for pier
8—Capstan Levers
8—Friction Roller Arms
8—Journal Boxes for Dam
8—Cast Gate Anchors
52—Cast Journals
1—Still for Water
1—set Derrick Fittings."

Any attempt to remove any of the above listed items will be considered as a trespass, as the Government has actually taken physical possession of the property under the terms of the annulled contract.

For, and in the absence of Captain A. E. Waldron,
Very respectfully,

R. C. SMEAD,
Assistant Engineer.

"DEFENDANT'S EXHIBIT 25."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, June 22, 1910.

Mr. F. W. Ward, Construction Superintendent for J. G. White & Co., Inc., Ferris, Texas.

SIR: Referring to the property recently seized by the Government at lock and Dam No. 6, Trinity River, Texas, and turned over to you, I inclose herewith memorandum invoice for same, and a form for receipt.

108 Please check these over with Mr. Erhardt, sign the receipt, and return same to this office. If you wish to make any change as to the number of articles you receive (as for instance in the round piles and the sheet piling), please take the matter up in detail with Mr. Erhardt.

Very respectfully,

A. E. WALDRON,
Captain Corps of Engineers.

"DEFENDANT'S EXHIBIT 25-1."

Receipt for Property Transferred to J. G. White & Company, Incorporated, by John Erhardt, Government Inspector at Lock and Dam No. 6, Trinity River, Texas.

1—anvil
2—40 H. P. Boilers with fittings
1—orange peel bucket
2—1 yd. bottom dump concrete buckets
10—1½ yd. Western Dump cars
10—Koppell 1 yd. cars
1—1 yd. Smith Concrete Mixer
1—derrick, cottonwood mast and boom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall
1—derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables
1—drill press
3—3-drum hoisting engines
1—forge
1—grindstone
1—jack screw
1—Smith-Vaile Pump, 2" discharge
1—Smith-Vaile Pump, 3" discharge
109 1—Pump, 1½" discharge
1—3" steam and water pipe line 600 ft. long
1—2" steam and water pipe line 294 ft. long
1—vise
1—600 gallon Cypress Water Tank
3—Crosscut saws
Blacksmith's blower and 48 small tools
1—Cement shed
1—Blacksmith shop
1—Material House
1—2 story bunk house
1—mess room
1—kitchen and commissary
1—office building
3—bunk houses
1—tramway, 16 lb. steel, 11,407 ft. of track
1—tramway, 20 lb. steel, 281 ft. of track
86—lineal ft. loose rail
1—suspension bridge, 350 ft. span

Round Piles.

Number.	Length.	Lineal feet.
3	12	36
23	14	322

Received the above listed articles, this 18th day of —, 1910.
J. G. WHITE & COMPANY, INC.,
By F. W. WARD,
Const. Sup't.

"DEFENDANT'S EXHIBIT 25-2."

Receipt for Property Transferred to J. G. White & Company, Incorporated, by John Erhardt, Government Inspector at Lock and Dam No. 6, Trinity River, Texas.

110

Round Piles.

Number.	Length	Lineal feet.
27	14	378
44	15	660
7	16	112
42	17	714
175	18	3,150
43	19	817
20	20	400
11	21	231
60	22	1,320
43	23	969
146	24	3,504
24	25	600
8	26	208
1	37	37
		10,768

Sheet Piling 4 x 12.

Number.	Length.	Ft. B. M.
2	16	128
1	19	76
2	20	160
103	25	10,300
1	26	104
		10,768

Wakefield Sheet Piling, Bolted and Ready for Use.

Number.	Length.	Ft. B. M.
2	20	480
1	21	252
10	22	2,640
13	24	3,744
111 5	25	1,500
3	26	936
		9,552

480—bolts with washers, ¾ x 12
1,100—lbs. nails
50—cords of wood
22—ft. gauges for pier
8—capstan levers
8—friction roller arms
8—journal boxes for dam
52—cast journals
1—still for water
1—set derrick fittings

Received the above listed articles, this 18th day of July, 1910.

J. G. WHITE & COMPANY, INC.,
By F. W. WARD,
Const. Sup't.

(Stamp:) "Plaintiff's Exhibit D."

Sten. M. W. C. Mar. 11, 1913.

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, November 10, 1910.

Register.

Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, Dallas, Texas.

GENTLEMEN: J. G. White & Co., Inc., has notified this office that it has no further use for the following items of plant retained
112 by the Government for the use of the new contractor for the completion of lock and dam No. 6, Trinity River, Texas, and desires to relinquish possession of same:

Estimated total value.	
$100.00	2 — 1 yd. bottom dump concrete buckets.
1,200.00	1 — triple drum Thos. Carlan Hoisting Engine with hoisting engine attached
600.00	1 — Flory Triple Drum Hoisting Engine.
50.00	1 — Smith-Valle pump, 2″ discharge.
75.00	1 — Smith-Valle pump, 3″ discharge.
25.00	1 — pump, 1½″ discharge.
$2,050.00	total assessed value of articles desired to be returned.

The rent on this machinery will terminate on November 15, 1910, as that date is considered to be a reasonable one upon which you could have taken possession of the machinery. Should the machinery not be removed from the locksite by December 15, 1910,

such action will be taken as an indication on your part of your intention to abandon same.

In fixing the rental on these items June 22, 1910, depreciation was figured at the rate of 33⅓ per cent. per annum, and interest allowed at 6 per cent. per annum: therefore to estimate amount of reduced rental for return of these articles I take:

33⅓% of $2,050.00	$683.33
6% of $2,050.00	123.00
	$806.33

and fix the deduction at $70.00 per month.

113 Hubbard Building & Realty Co.

November 10, 1910.

The rate fixed for the entire plant taken was.	$380.00	per month.
Deduct, as per above	70.00	" "
Leaves the rental to be paid commencing November 15, 1910	$310.00	" "

Very respectfully,
(Signed) A. E. WALDRON,
Captain Corps of Engineers.

A. E. W./b.

"PLAINTIFF'S EXHIBIT E."

Sten. M. W. C. Mar. 11, 1913.

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, January 30, 1911.

Register.

Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, Dallas, Texas.

GENTLEMEN: J. G. White & Co., Inc., has indicated to this office that it has no further use for the various items of plant retained by the Government for the use of the new contractor for the completion of lock and dam No. 6, Trinity River, Texas, and desires to relinquish possession of same.

The items of plant, possession of which it is now desired
114 to relinquish, are described in my letter to you of June 22, 1910 fixing the rental value on same, as follows:

1 Anvil.
2 40 H. P. Boilers with fittings.
1 Orange peel bucket.
10 1½ yd. Western Dump Cars.
10 Koppell 1 yard cars.
1 1 yd. Smith Concrete mixer.
1 Derrick, cotton wood mast and boom with derrick fittings and guy wires, but without hoisting cable standing on north end of wall.
1 Derrick, steel mast and boom, with fittings and guy lines, but without hoisting cables.
1 Drill Press.
1 3-drum hoisting engine.
1 Forge.
1 Grindstone.
1 Jack Screw.
1 3″ steam pipe line 600 ft. long.
1 2″ steam and water pipe line 294 ft. long.
1 Vise.
1 600 gallon Cypress water tank.
3 crosscut saws.
Blacksmith's blower and small tools.
1 Cement Shed.
1 Blacksmith Shop.
1 Material House.
1 2-story bunk house.
1 Mess Room.
1 Kitchen and commissary.
1 Office building.
3 Bunk Houses.
1 Tramway, 16 lb. steel, 11,407 ft. of track.
1 Tramway, 20 lb. steel, 281 ft. of track.
86 lineal feet Loose Rail.
115 1 Suspension Bridge, 350 ft. span.
1 still for water.
1 set Derrick Fittings.

I therefore have to inform you that the rent on this machinery will terminate on January 31, 1911, and you will be given until February 28, 1911 to take possession of the same. Should the machinery not be removed from the locksite by February 28, 1911, such action will be taken as an indication on your part of your intention to abandon same.

The plant, possession of which it is now desired to relinquish, is in addition to that heretofore relinquished, as per my letter of November 10, 1910.

Very respectfully,

(S.) A. E. WALDRON,
Captain Corps of Engineers.

"DEFENDANT'S EXHIBIT 30."

Sten. M. W. C. Mar. 11, 1913.

Telegram.

The Postal Telegraph-Cable Company of Texas.

Received at 243 Main St., Dallas, Texas (Telephones Main 900 and 941).
296 CX Y 59—Collect Govt.

WASHINGTON, D. C., Feb. 3-11.

Captain Waldron, Federal Bldg., Dallas, Tex.:

Reference plant lock six Trinity surety co-objects strongly to return of any plant to Hubbard Building and Realty Co. or to any other claimant. Withdraw your letter Jan'y thirtieth to Hubbard Building and Realty Co. and retain possession of all plant till further advised by this office.

BIXBY,
Chief of Eng'rs. 3.40 P. M.

116 "DEFENDANT'S EXHIBIT 32."

War Department,

United States Engineer Office,

Federal Building.

DALLAS, TEXAS, February 3, 1911.

Register.

Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, Dallas, Texas.

Sten. M. W. C. Mar. 11, 1913.

GENTLEMEN: On January 30, 1911, I sent you a letter by registered mail, stating that J. G. White & Co., Inc., had indicated to this office that it had no further use for the various items of plant retained by the Government for the use of the new contractor for the completion of lock and dam No. 6, Trinity River, Texas, and desired to relinquish possession of the same. The items, possession of which it was desired to relinquish, were listed in the said letter, and you were informed that the rent on these articles would terminate on January 31, 1911 and you would be given until February 28, 1911 to take possession of the same.

I am today in receipt of telegraphic instructions from the Chief

of Engineers, Washington, D. C., directing that I withdraw the letter above referred to, and retain possession of all plant until further advised by him.

I therefore now advise you that I hereby withdraw my said letter of January 30, 1911, and that the telegraphic instructions of the Chief of Engineers will govern in the premises.

Very respectfully,
(S.) A. E. WALDRON,
Captain Corps of Engineers.

A. E. W./b.

117 "DEFENDANT'S EXHIBIT 33."

War Department,
United States Engineer Office,
Federal Building.

Sten. M. W. C. Mar. 11, 1913.

DALLAS, TEXAS, February 3, 1911.

Mr. John Ehrhardt, Inspector, Lock & Dam No. 6, Trinity River, R. F. D. No. 1, Crisp, Texas.

SIR: I enclose herewith copy of letter written this day to Hubbard Building & Realty Co., Mr. Geo. A. Carden, President, which is self-explanatory.

In view of the telegraphic instructions from the Chief of Engineers, cited in letter copy of which is enclosed, you will under no circumstances allow the Hubbard Building & Realty Co., or any other claimant, to take possession of any item of plant or machinery at lock and dam No. 6, Trinity River, Texas.

An acknowledgment of this letter is requested.

Very respectfully,
(S.) A. E. WALDRON,
Captain Corps of Engineers.

1 inclos.—copy of letter.
b

GEORGE D. WATROUS,
Committee.

118 In the United — District Court, Holden at Hartford, in and for the District of Connecticut, on the 24th day of May, 1916.

Present: Hon. Edwin S. Thomas, Judge.

The United States District Court in and for the District of Connecticut, May 24th, 1916.

At Law. No. 813.

BALL ENGINEERING COMPANY, of St. Louis, Missouri, a Corporation Organized and Existing under the Laws of the State of Missouri,

v.

J. G. WHITE & COMPANY, INCORPORATED, of Bridgeport, Connecticut, a Corporation Organized and Existing under the Laws of the State of Connecticut.

Judgment.

This action, by summons and complaint claiming Twenty Thousand Dollars ($20,000) damages, as on file, came to this Court, on the first Monday of June, 1911, when the parties appeared and were at issue, as on file, and said action by consent of the parties was referred to George D. Watrous, Esquire, of New Haven, as sole Committee, to hear and determine the same and report his findings of fact and conclusions of law; and said Committee on November, 1913, filed his report in this Court and his findings and conclusions that the defendant had unlawfully converted the personal property described in the plaintiff's complaint, and that the plaintiff was entitled to judgment in its favor for Fifteen Thousand Dollars ($15,000) with interest; and said report was duly accepted
119 by this Court and judgment was entered on the 23rd day of April, 1914, as of March 31, 1914, on the report of said Committee in favor of the plaintiff and against the defendant and awarding the sum of Eighteen Thousand Three Hundred and Sixty-two Dollars and Fifty cents, ($18,362.50), to the above-named plaintiff; and the defendant having appealed from said judgment to the United States Circuit Court of Appeals for the Second Circuit, before which Court the transcript of the record in this Court was brought by virtue of a writ of error, and the mandate of the said United States Circuit Court of Appeals, for the Second Circuit in this case being duly filed on the 29th day of April, 1915, in the office of the Clerk of this Court directing that said judgment be reversed with costs taxed at the sum of Nine Hundred and Seven Dollars and Eighty Cents ($907.80), and that this Court take such further proceedings in accordance with a decision of the United States Circuit Court of Appeals for the Second Circuit, as according to right and justice and the laws of the United States ought to be had; and an order was duly entered in this Court by consent of the parties on

March 13, 1916, referring said action again to George D. Watrous, Esquire, of New Haven, as sole Committee, to hear and determine the same and to report his findings of fact and conclusion of law to this Court.

Said action came by continuance to the 27th day of April, 1916, when said Committee returned his report to this Court; and the Court, having heard the parties, and counsel, for the plaintiff having appeared and remonstrated against the acceptance of said report on the ground that the said Committee erred in his conclusions as set forth in said report and numbered 6 and 7, accepts said report and finds the facts to be as therein stated and sustains the con-
120 clusions of law as set forth in said report and therefore finds the issues for the defendant, to conform to the said decision of the said United States Circuit Court of Appeals.

Whereupon, it is adjudged that the defendant do have and recover of and from the plaintiff his costs taxed at — Dollars.

EDWIN S. THOMAS,
U. S. District Judge.

121 District Court of the United States for the District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY,

v.

J. G. WHITE & COMPANY

Stipulation as to Record.

It is hereby stipulated that the record on the writ of error to the District Court of the United States for the District of Connecticut in the above entitled action consist of the following:

1. Petition for writ of error and order allowing same.
2. Writ of eror.
3. Citation.
4. Writ and complaint.
5. Answer.
6. Reply.
7. Order of reference to Committee.
8. Stipulation waiving jury.
9. Report of Committee and exhibits made a part of the report or referred to therein.
10. Judgment entered on the 24th day of May, 1916.
11. Stipulation *de* record.
12. Certification of record by the Clerk.

The filing of any additional bond on the part of the plaintiff-in-error is hereby waived.

Dated at Stamford, Conn., this 22nd day of August, 1916.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff in Error.
LEWIS SPERRY,
Attorney for Defendant in Error.

122 United States District Court, District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY

v.

J. G. WHITE & COMPANY.

Stipulation.

It is hereby stipulated and agreed that the Clerk of the United States District Court for the District of Connecticut shall have his time for transcribing and filing the record in the above entitled cause on writ of error in the Circuit Court of Appeals for the Second Circuit extended to the first day of November, 1916.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.
LEWIS SPERRY,
Attorneys for Defendant.

123 United States District Court, District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY,

v.

J. G. WHITE & COMPANY.

Stipulation.

It is hereby stipulated and agreed that the Clerk of the United States District Court for the District of Connecticut shall have his time for transcribing and filing the record in the above entitled cause on writ of error in the Circuit Court of Appeals for the Second Circuit extended to the 29th day of November, 1916.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.
LEWIS SPERRY,
Attorneys for Defendant.

124 United States District Court, District of Connecticut.

At Law. No. 813.

BALL ENGINEERING COMPANY,

v.

J. G. WHITE & COMPANY.

Stipulation.

It is hereby stipulated and agreed that the Clerk of the United States District Court for the District of Connecticut shall have his time for transcribing and filing the record in the above entitled cause on writ of error in the Circuit Court of Appeals for the Second Circuit extended to the 30th day of December, 1916.

CUMMINGS & LOCKWOOD,
Attorneys for Plaintiff.
LEWIS SPERRY,
Attorneys for Defendant.

125 *Certification of Clerk.*

UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut, Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 125, inclusive, contain a true transcript of the record and proceedings had in said Court, as consented to by the written stipulation of the parties hereto annexed, in the case of The Ball Engineering Company, Plaintiff in Error, versus The J. G. White Company, Defendants in Error, At Law No. 813.

I further certify that my fees for preparing and forwarding said transcript are $35, which have been paid to me by counsel for the plaintiff in error.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Hartford, in the District of Connecticut, in the Second Circuit, this 20th day of December, one thousand nine hundred and sixteen.

C. E. PICKETT, *Clerk.*

126 United States Circuit Court of Appeals, for the Second Circuit, October Term, 1916.

No. 209.

Argued March 8, 1917. Decided April 17, 1917.

BALL ENGINEERING COMPANY, Plaintiff in Error,

v.

J. G. WHITE & COMPANY, Defendant in Error.

In Error to the District Court of the United States for the District of Connecticut.

Before Ward, Rogers and Hough, Circuit Judges.

Per Curiam:

Having examined the record presented by this writ, we are of opinion that it differs in no material fact from that considered in 233 Fed. Rep. 618. Therefore the decision then made is binding, the issues have been adjudicated, and the judgment below is affirmed with costs.

127 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court-rooms in the Post-office Building in the City of New York, on the 27th day of April, one thousand nine hundred and seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

BALL ENGINEERING COMPANY, Plaintiff in Error,

v.

J. G. WHITE & COMPANY, Defendant in Error.

Error to the District Court of the United States for the — District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the — District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.

128 Endorsed: United States Circuit Court of Appeals, Second Circuit. Ball Co. v. J. G. White Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1917. William Parkin, Clerk.

129 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 128 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Ball Engineering Company against J. G. White & Company as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of June in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

130 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Ball Engineering Company is plaintiff in error and J. G. White & Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Connecticut, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

131 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,056. Supreme Court of the United States, No. 589, October Term, 1917. Ball Engineering Company

vs. J. G. White & Company. Writ of Certiorari. Filed Nov. 7, 1917. United States Circuit Court of Appeals, Second Circuit. William Parkin, Clerk.

132 United States Circuit Court of Appeals for the Second Circuit.

BALL ENGINEERING COMPANY, Plaintiff in Error,

v.

J. G. WHITE & COMPANY, Defendant in Error.

The Supreme Court of the United States having granted a writ of certiorari in the above case, it is hereby stipulated that the certified transcript of record on file herein in the office of the clerk of the United States Supreme Court may be taken as the return to said writ.

Dated October 31st, 1917.

CHARLES LOCKWOOD,
CUMMINGS & LOCKWOOD,
Attorneys for Ball Engineering Company, Plaintiff in Error.

LEWIS SPERRY,
J. KEMP BARTLETT,
Attorneys for J. G. White & Company, Defendants in Error.

133 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of said court, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 9th, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

134 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Ball Engineering Co. v. J. G. White & Co. Return to Certiorari.

135 [Endorsed:] File No. 26,056. Supreme Court U. S. October term, 1917. Term No. 589. Ball Engineering Co., Petitioner, vs. J. G. White & Company. Writ of certiorari and return. Filed November 12, 1917.

Office Supreme Court, U. S.
FILED
JUL 23 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917, No. 227

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE & COMPANY, a corporation,
Respondent.

Notice of Motion, Motion, Petition and Brief on Application for Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

HOMER S. CUMMINGS,
Attorney for Petitioner,
Ball Engineering Company.

CHAS. P. YOUNG CO., Printers, 19 Beaver St., N. Y.

Supreme Court of the United States of America.

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE AND COMPANY, a corporation,
Respondent.

Notice of Application for Writ of Certiorari.

SIRS:

Please take notice that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit will be presented to the Supreme Court of the United States, at the Capitol in Washington, District of Columbia, on the first day of October, 1917, at the opening of Court at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard.

Dated, Stamford, Conn., July 18, 1917.

Yours, etc.,
HOMER S. CUMMINGS,
Attorney for Ball Engineering Company.

CHARLES D. LOCKWOOD,
WILLIAM M. PARKE,
Of Counsel.

To:
LEWIS SPERRY, Esq.,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES OF AMERICA.

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE AND COMPANY,
Respondent.

Motion for Issuance of Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit.

Now comes the petitioner, Ball Engineering Company, by its counsel, and prays this Honorable Court that it shall, by Certiorari or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals, for the Second Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein this petitioner was the plaintiff in error and J. G. White and Company was the defendant in error, the same being number 209 on the docket of said Circuit Court of Appeals for the October Term, 1916, and to that end said petitioner now tenders herewith its petition, together with the duly certified copy of the entire record herein in said Circuit Court of Appeals.

Dated, Stamford, Conn., July 18, 1917.

HOMER S. CUMMINGS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES OF AMERICA.

BALL ENGINEERING COMPANY, *Petitioner,* *against* J. G. WHITE AND COMPANY, *Respondent.*	Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of the Ball Engineering Company above named respectfully shows to this Court on information and belief as follows:

In 1906, the United States entered into a contract with the Hubbard Building & Realty Company, a corporation, for the construction of Lock and Dam No. 6 on the Trinity River, Texas. The contract was annulled by the United States in 1909. The United States then entered into a contract in May, 1910, with J. G. White & Company, the respondent, for the completion of the work. J. G. White & Company endeavored to purchase from the petitioner certain tools, machinery, plant and materials belonging to the petitioner, on the site of Lock and Dam No. 6, but could not agree with the petitioner on price. Thereupon the respondent, knowing that the property did not belong to the Hubbard Building & Realty Company and that it did belong to the petitioner, requested the United States to seize

it under the annulment clause (paragraph 33) of the original contract between the United States and the Hubbard Building & Realty Company. The United States thereupon, under a mistaken theory of its rights under paragraph 33 of the original contract, to be more fully referred to hereafter, seized the said property, having first entered into an agreement with the respondent that all liability for the seizure should be upon the respondent and not upon the Government. The Government further coupled the seizure with an express declaration, both to the respondent and to the petitioner, that the seizure was made by the United States by virtue of its rights under paragraph 33 of the original contract with the Hubbard Building & Realty Company.

This is an action of conversion by the petitioner against the respondent for converting the said property. The Committee who heard the case, the United States District Court, and the Circuit Court of Appeals have all decided that the United States was without authority to seize the petitioner's property under paragraph 33 of the contract between the United States and the Hubbard Building & Realty Company. The Committee and the United States District Court, upon the first trial, rendered judgment in favor of the plaintiff for the value of the property converted. The Circuit Court of Appeals reversed the decision of the District Court on the ground that the United States seized the property as sovereign under the right of eminent domain, and acquired title, and that therefore the respondent was not liable for conversion. Upon a second trial the Committee and the District Court were constrained

to render judgment in favor of the defendant to conform to the decision of the Circuit Court of Appeals. Such judgment was affirmed by the Circuit Court of Appeals on the second appeal and that mandate of affirmance is the judgment which petitioner desires this court to review. Upon the argument in the Circuit Court of Appeals, the Assistant Attorney General and the United States Attorney for the District of Connecticut appeared and filed a brief on behalf of the United States as *amicus curiae,* in opposition to the claim that the United States had seized the petitioner's property as sovereign under the right of eminent domain.

The petitioner desires this Court to review the decision of the Honorable Circuit Court of Appeals, which is to the effect that, when the United States seizes property acting solely under the alleged rights of the Government under the terms of a written contract by virtue of which the Government claims to have the right to seize and retain the property without payment to the owner, that although the Government's claim as to its rights under the contract is held to be without merit so that it appears that the United States did not have the authority to seize the property under the contract, nevertheless the United States will be held to have seized the property as sovereign, or, in other words, in the exercise of the right of eminent domain.

The facts in detail are as follows:

I.—On July 10, 1906, the United States entered into a contract with Hubbard Building & Realty Company, a corporation organized under the laws of the State of Texas, whereby said Company agreed to construct Lock and Dam No. 6

on the Trinity River, Texas (Record, fol. 72). On September 9, 1909, work on the Lock and Dam was discontinued, and on October 22, 1909, the Government in accordance with its provisions annulled the contract with the Hubbard Building & Realty Company (Record fols. 80-81). At the time of such annulment there was then situated upon the land belonging to the United States, being the site of Lock and Dam No. 6, a considerable amount of personal property consisting of machinery, tools, plant and materials, all of which belonged to one P. D. C. Ball and none of which had ever been owned by the Hubbard Building & Realty Company, the corporation having the contract with the Government as aforesaid (Record, fols. 73-74, 76-78). On April 2, 1910, the petitioner, Ball Engineering Company, was incorporated under the laws of the State of Missouri, and said Ball transferred to it all of the personal proporty above mentioned. Said property was still upon the site of Lock and Dam No. 6 (Record, fols. 70-72).

II.—On March 16, 1910 and on April 16, 1910, respectively, the said Ball and petitioner notified the United States Engineer in Charge of the work on Lock and Dam No. 6, in writing, that the personal property above referred to belonged to said Ball and demanded its return by the United States Government. (Record, fols. 275-280, Defendant's Exhibits 5 & 6.) On April 28, 1910, the said Engineer in Charge wrote to the petitioner stating that the United States claimed that it had the right

> "under paragraph 33 of the specifications forming part of the contract, to take pos-

session of all or part [of personal property above referred to], under purchase at a valuation to be determined by the Engineer Officer in charge. It is not yet certain whether or not the United States will elect to exercise this right. If the right is exercised, the contractor [the Hubbard Building and Realty Company which did not own the property] will be allowed credit for the fair value of the plant and materials, in final settlement; if the right is not exercised the property will be turned over to the contractor's representative.

"The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value" (Record, fols. 281-285, Defendant's Exhibit 18).

Paragraph 33 of the contract between the United States Government and the Hubbard Building & Realty Company, referred to in said Defendant's Exhibit 18, reads as follows:

"3. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be,

and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge" (Record, fols. 144-145).

III.—Subsequent to the date of the letters of March and April, 1910, referred to above, and prior to May 18, 1910, there were negotiations between the respondent, J. G. White and Company (which was then contemplating the making of an agreement with the Government to complete the construction of the lock and dam) and the petitioner, Ball Engineering Company, for the purchase or rental of said personal property by the respondent from the petitioner, but said negotiations failed to result in an agreement between said parties (Record, fols. 88-89).

IV.—On May 18, 1910, the United States entered into a written contract with the respondent, J. G. White and Company, for the completion of the construction of Lock and Dam No. 6. Said contract after referring to and enumerating the articles of personal property belonging to the petitioner and located on the site of Lock and Dam No. 6, contained the following provision, designated as "Insert E following paragraph 38":

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the speci-

fications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in charge and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. *It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.''* (Record, fols. 236-238). (Our italics.)

V.—Notwithstanding the above declaration on the part of the United States contained in the contract with the respondent, the Honorable Circuit Court of Appeals has held that although the United States declared that it seized the property by virtue of said paragraph 33, which it

was without authority to do, it took the property as sovereign and acquired title, so that the respondent obtained from it the right to possession as against the petitioner. If the decision of the Honorable Circuit Court of Appeals is not reversed, then whenever the United States attempts to take property by virtue of a contract, it must be held to be a sovereign taking, if the government acts beyond its rights under the contract. This is a new and novel principle which compels the United States to act as sovereign, although it expressly states that it acts by virtue of a written contract, and thereby impliedly declares that it does not act as sovereign.

VI.—The respondent by a letter dated May 18, 1910, to the United States Engineer in charge of the work at Lock and Dam No. 6, requested the Government to take possession of the personal property of the petitioner above referred to, in accordance with the provisions of paragraph 33 of the original contract between the Government and the Hubbard Building & Realty Company and the provisions of Insert E of the contract between the United States and the respondent (both of which have been quoted hereinabove) (fols. 190-192).

VII.—In accordance with said request and on June 6, 1910, the Government Engineer in charge of said work notified the petitioner in writing that the respondent had made such request and that said articles of personal property "are taken possession of under the provisions of paragraph 33 of the original specifications which form a

part of the contract" (Record, fols. 89-91; Defendant's Exhibit 22, fols. 290-305), and that

> "The conditions under which the Government takes possession are given in Insert 'E' following paragraph 38 of the specifications for the completion of Lock and Dam No. 6, Trinity River, Texas, which reads:"

following which the letter contained a copy of the provisions of Insert E. On the same date (June 6, 1910) the United States Engineer in charge of the work sent to the respondent a copy of said letter, Defendant's Exhibit 22, together with a letter addressed to the respondent, Defendant's Exhibit 23, which stated that said Ball and the Ball Engineering Company claimed ownership of said personal property (Record, fols. 306-308, Defendant's Exhibit 23); and also stating that the personal property was turned over to the respondent "under the conditions contained in Insert 'E' following paragraph 38 of the specifications for the construction of Lock and Dam No. 6, Trinity River, Texas, for use in further work on Lock and Dam No. 6, Trinity River, Texas" (Record, fols. 91-92).

VIII.—On June 8, 1910, a notice was sent on behalf of the petitioner to said respondent, J. G. White and Company, stating that the personal property above referred to did not belong to the Hubbard Building and Realty Company, but was the personal property of said Ball (Record, fol. 89), and the same notice was also sent on the same date to the United States Engineer in charge of said work (Record, fols. 286-290, Defendant's Exhibits 1 and 2).

On June 9, 1910, the United States Engineer in charge sent a letter to the petitioner (Defendant's Exhibit 24) acknowledging the receipt of said letter and reiterating the claim of the Government of its alleged right to take possession of the property under the terms of the annulled contract (fols. 310; 320).

IX.—On February 3, 1911, the United States Chief of Engineers at Washington, D. C., by telegram, advised the Engineer Officer in charge of the work at Lock and Dam No. 6 that the surety upon the annulled contract of the Hubbard Building & Realty Company objected to the return of the plant to any claimant (Defendant's Exhibit 30, fol. 345), and on the same day the Engineer Officer notified in writing the United States Inspector upon the work that he should not under any circumstances allow any claimant to take possession of any item of property or machinery on the site of Lock and Dam No. 6. Said property of petitioner remained on the site of Lock and Dam No. 6 (fols. 101-102, Defendant's Exhibit 33).

X.—In the accounts between the United States and the Hubbard Building and Realty Company, kept at the office of the engineer of the United States at Dallas, Texas, entries were made by employees of the United States crediting the Hubbard Building and Realty Company with the valuation of said property as determined by the engineer officer in charge. After the deduction of this credit a balance was by the account shown to be due from the Hubbard Building and Realty Company to the United States (Record, fols. 97-98; 103-104).

XI.—In May, 1911, petitioner, as the plaintiff, brought suit against the respondent, as the defendant, in the United States District Court for the District of Connecticut for the conversion of the property above referred to (fols. 19-32). The respondent filed an answer in which it attempted to justify the possession and use of the petitioner's property on the theory that the United States had the right to and did acquire title to that property by virtue of the provisions of paragraph 33 of the specifications of the contract between the United States and the Hubbard Building and Realty Company, dated July 10, 1906. No allegation of the answer in any way suggested that it was claimed that the Government had acquired title in any way or by any right other than in the attempted exercise of such right as it might have under paragraph 33 of said contract (Answer, fols. 34-54).

XII.—Thereafter the case came on for trial before a referee (referred to under the Connecticut practice as a committee) and the respondent offered proof in an endeavor to justify the taking of the property by the Government under the provisions of paragraph 33 of said contract. The committee made a report which contained findings of fact which were substantially identical with those contained in the second report of the committee printed at fols. 67-103 of the record filed herewith. Upon the first trial the committee found certain conclusions which are contained in the present conclusions and numbered 3, 4 and 5, and which in substance were to the effect

> that paragraph 33 of the contract between the United States and the Hubbard Building

and Realty Company did not as a matter of law authorize the United States to purchase materials, tools, etc., belonging to a third party in the absence of the agreement of such third party and owner to assent to the provisions of paragraph 33; that paragraph 33 did not authorize the United States to purchase materials, tools, etc., prepared for use or in use in the prosecution of the work, save on payment to the owner of a valuation; that said paragraph 33 did not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon the payment of a rental value to be determined by the engineer officer in charge; and that the United States did not acquire any title or right to the possession of said property of the petitioner by virtue of paragraph 33 (fols. 105-107).

XIII.—The committee accordingly found in his first report that the respondent had wrongfully and unlawfully converted the property of the petitioner and fixed the value of said property at $15,000. The United States District Court entered judgment in favor of the petitioner and against the respondent upon said report, (Ball Engineering Company *v.* J. G. White & Company, 212 Fed., 1009). The respondent thereafter sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit, and upon the argument contended for the first time that the petitioner's property was taken by the United States as sovereign under the right of eminent domain, although no such allegations

had been set forth in the respondent's answer nor had any such contention been made before the committee on the trial or before the District Court.

XIV.—That said Circuit Court of Appeals, in deciding the case on such first writ of error, stated in its opinion that the committee was correct in his rulings that the United States had no right to take the property of the petitioner by virtue of anything contained in the contract between the United States and the Hubbard Building and Realty Company. Said Court also held, however, that the United States took the property as sovereign under the right of eminent domain and thereby acquired title and that the respondent was therefore not guilty of conversion. The judgment in favor of your petitioner was therefore reversed and a new trial ordered. The second trial was had before the same committee and he, after finding the facts substantially as upon the first trial, was compelled, in deference to the decision of the Circuit Court of Appeals, to hold as a conclusion of law that "the Government of the United States took title to said property as sovereign and on or about the 6th day of July, 1910, leased said property to the defendant, and the defendant took possession thereof and thereafter used the same, but was not guilty of conversion by reason thereof" (fol. 108).

XV.—Judgment was entered upon said report by the District Court and a writ of error was sued out to the Circuit Court of Appeals by the petitioner. The Circuit Court of Appeals handed

down an opinion on such second writ of error stating that the case was substantially identical with that which was before it on the prior appeal and that it was bound to follow its former decision and accordingly affirm the judgment (Opinion, fols. 376-377).

XVI—The errors in the decision of the Circuit Court of Appeals assigned by this petitioner are as follows:

Said Circuit Court of Appeals was in error;

(*a*) In holding that the taking of property by the Government, in pursuance of its alleged rights under a private contract, does not constitute a proprietary taking and is a taking under the right of eminent domain.

(*b*) In holding that, even if the taking of property by an officer of the Government is tortious, the Government acquires title and can be compelled to pay to the owner the reasonable value of the property taken.

An examination of the record in this case and the opinions rendered by the Honorable Circuit Court of Appeals in this case and in the case of *United States* v. *Buffalo-Pitts Co.*, 114 C. C. A., 119, 193 Fed., 905, will show that said Court has definitely adopted as rules of substantive law these erroneous propositions. The decision of said Court is irreconcilable with the decisions of this Court upon the same subject and with those of the Courts of co-ordinate jurisdiction and has created confusion and uncertainty in the law with reference to the effect of the taking of property by officers of the Government when purporting to act under the

terms of contracts between the Government and private citizens, with reference to the right of private citizens to recover from individual and corporate tort feasors when such tort feasor claims to have acted under authority of an officer of the Government, and as to the effect upon the title to property tortiously taken by an officer of the Government or by a private tort feasor acting under the supposed authority of an officer of the Government. It is obvious that these questions, arising as they do almost constantly between officers of the Government and persons who have tools and material upon Government reservation or are engaged in performing work on Government contracts, are of the utmost importance, both to the Government and to such private persons. It is extremely important that this Court, by granting *certiorari* in this case, determine these vexed questions so that the confusion and uncertainty now existing on these questions may be cleared away.

WHEREFORE, your petitioner prays that this Honorable Court may be pleased, in the light of the provisions of the Act of January 28, 1915, to grant a writ of *certiorari* in this case to the United States Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

Dated, New York, July 18, 1917.

BALL ENGINEERING COMPANY,
by Homer S. Cummings
Attorney.

UNITED STATES OF AMERICA,
State and District of Connecticut, } ss:
County of Fairfield,

HOMER S. CUMMINGS, being duly sworn, deposes and says, that he is the attorney for the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the source of deponent's information and the grounds of his belief as to the matters therein stated to be alleged upon information and belief are the testimony, exhibits and proceedings in this case. That the reason why this verification is not made by the petitioner is that it is a corporation of the State of Missouri, and that none of its officers resides or is within the State of Connecticut.

HOMER S. CUMMINGS.

Sworn to before me this 18th day of July, 1917.

Raymond E. Hadsell

Notary Public.
Fairfield County.

I hereby certify that I have read the foregoing petition and am familiar with the contents thereof. The grounds therein stated in support of the application made for a writ of *certiorari* herein are in my opinion well founded in point of law. This application is not made for purposes of delay.

HOMER S. CUMMINGS,
Attoney for Petitioner.

July 18, 1917.

The United States, believing that the decision of the Court below is erroneous, and that its ruling to the effect that the United States is liable on an implied contract where property is taken by one of its agents under the circumstances disclosed in this record will have an important and detrimental effect on the rights of the United States under contracts of this character, and having filed a brief in the Court below, as *amicus curiae;* hereby joins in the prayer of this petition.

JOHN W. DAVIS,
Solicitor General.

Supreme Court of the United States of America.

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE AND COMPANY,
Respondent.

Brief for Petitioner.

This is an action for conversion against J. G. White & Company, a corporation, for converting to its own use and using certain material, tools, plant, etc., belonging to the Ball Engineering Company, the petitioner.

Prior to May 18, 1910, the respondent, J. G. White & Company, was in negotiation with the petitioner for the purchase or rental of the petitioner's machinery, tools and material on the site of Lock and Dam No. 6 (Report of Committee, fols. 88-89). The negotiations did not result in an agreement (*ibid.*) Thereupon the respondent, on May 18, 1910, entered into a contract with the United States for the completion of Lock and Dam No. 6 (fol. 89). That contract contained a clause ("Insert E") by the terms of which the United States bound itself to "exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company to take pos-

session of and retain all material, tools," etc., on the site of the Lock and Dam and to turn the same over to the respondent for use on the work (Record, p. 101). The clause also contained the following significant language:

> "It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor (J. G. White, the respondent here) concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."
>
> (Record, p. 101; Report of Committee, fol. 87, also pp. 79-80.)

In accordance with the foregoing provisions of its contract with the United States, the respondent, by letter dated May 18, 1910, requested the Government to seize the petitioner's material, tools, etc., on the Lock and Dam site (Record, pp. 30-31; Defendant's Exhibit 20, pp. 63-64). The Engineer Officer in charge of the work for the United States thereupon did seize the petitioner's property, coupling the seizure with an express statement in writing to both the petitioner and the respondent that the material, tools, etc., "are taken possession of under the provisions of Paragraph 33" of the Hubbard Building & Realty

Company contract with the Government, and that the conditions under which the seizure was made by the United States were those set forth in "Insert E" contained in the contract between the United States and the respondent, referred to above (Record, pp. 30, 101).

Immediately upon receiving notice of the seizure the petitioner protested in writing both to the Government and to the respondent (Record, pp. 30-31; letters of June 8, 1910, pp. 96-97).

The findings of the Committee establish, and in fact it has never been disputed, that the United States seized the petitioner's property solely in pursuance of the Government's alleged rights under the terms of its contract with the Hubbard Building & Realty Company and under the claim that the Government had the right under the terms of that contract to take the *petitioner's* property located upon the Lock and Dam site and to give credit for the value, as fixed by the Engineer Officer, upon the indebtedness of the *Hubbard Building & Realty Company to the United States, without payment or credit of any kind to the petitioner, the owner of the property.* (Findings 17, 18, 19, 26 and 32, Record, pp. 30-35; see also Defendant's Exhibit 18, pp. 94-95; Exhibit 21, pp. 79-80; Exhibit 22, pp. 97-102; Exhibit 20, pp. 63-64. All of the above exhibits are by reference incorporated in and form part of the Report of the Committee.)

The Government's position was succinctly stated in Defendant's Exhibit 18, a letter from Captain Waldron, the Engineer Officer in charge, to the petitioner, in April, 1910, setting forth the contents of a letter from the United States Chief

of Engineers Bixby at Washington to Captain Waldron (Record, pp. 94-95; Committee's Report, fol. 88):

> "The United States has the right, under paragraph 33 of the specifications forming part of the contract, to take possession of all or part thereof (petitioner's property) under purchase at a valuation to be determined by the Engineer Officer in charge. * * * If the right is exercised, the contractor (Hubbard Building and Realty Co., which company did not own the property) will be allowed credit for the fair value of the plant and materials in final settlement; * * * The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value."

The respondent's answer in the present suit followed the same theory and alleged in effect that the United States had the right to and did take the petitioner's property by virtue of paragraph 33 of the contract between the Government and the Hubbard Building & Realty Company (Record, pp. 13-15). The case was defended before the Committee on the first trial on the same theory. Both the Committee and the District Court rejected that defense and rendered a decision in favor of the petitioner (there plaintiff). The Circuit Court of Appeals agreed with the lower Courts in their rejection of that theory and stated:

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company."
>
> *J. G. White & Co.* v. *Ball Engineering Co.*, 223 Fed. Rep., 618; 139 C. C. A., 164.

The theory upon which the Circuit Court of Appeals reversed the first judgment, which was in favor of the petitioner, and affirmed the second judgment, which was in favor of the respondent, will be found stated in the opinion of the Circuit Court of Appeals handed down on its decision of the first writ of error and reported at 223 Fed. Rep., 618, and 139 C. C. A., 164. For the convenience of the Court a copy of said opinion is hereto annexed and marked "Schedule A." In that opinion the Court, after summarizing the facts found by the Committee and stating that—

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company,"

reached the conclusion that the judgment of the Court below, in favor of the petitioner, should be reversed for the following reasons, as stated in the opinion:

> "All the same it (the Government) did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this sub-

ject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim and therefore was bound to pay the real owner of the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company.

* * * * * * *

"We have considered this general subject in U. S. *v.* Buffalo-Pitts. Co., 193 Fed. Rep., 905, affirmed 234 U. S., 228. In accordance with that decision we think that the Government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion. The judgment is reversed."

The opinion of the learned Circuit Court of Appeals asserts (1) that although the United States in seizing the petitioner's property acted solely in pursuance of the alleged rights of the United States under paragraph 33 of the contract between the United States and the Hubbard Building & Realty Company, nevertheless the seizure, made solely under such an alleged con-

tractural right of the Government, did not constitute a *proprietary* taking, but was a taking under the right of eminent domain, or, in other words, a taking as sovereign; (2) that even if the taking was tortious, the Government acquired title and can be compelled to pay to the owner the reasonable value of the property taken. We submit that both propositions are fundamentally and wholely erroneous.

I.

The taking of the petitioner's property by the officers of the United States was not a taking under the right of eminent domain, but was a proprietary taking under a doctrine of private law which did not in any way rest upon the rights of the Government as sovereign and which, if correct in theory, would have been equally available to any private citizen under similar circumstances.

(*a*) The legal proposition asserted by the learned Circuit Court of Appeals may be stated in general terms as follows: That when the Government appropriates property of which it does not claim to be the absolute owner in fee, and for which it does not claim to have already paid in full at the time of the taking, such an appropriation is *ipso facto* a taking by the Government *as sovereign,* upon an implied contract to pay the owner just compensation, notwithstanding the fact that the Government takes the property un-

der the claim that the owner has by bringing it upon the site of certain Government work, subjected it to the terms of a contract between the Government and the third person, and that under the terms of that contract the Government has the right to take the property upon giving credit to the third person, who is indebted to the Government, and without any payment or credit to the owner of the property.

The doctrine thus enunciated by the learned Circuit Court of Appeals seems to have had its origin in the opinion of that Court in the case of *United States* v. *Buffalo-Pitts Company,* 114 C. C. A., 119; 193 Fed., 905, at pp. 906-907. It is true that the Buffalo-Pitts case was affirmed by this Court (234 U. S., 228), but the opinion of this Court shows conclusively that it rejected the theory upon which the Circuit Court of Appeals had decided the case, and that the affirmance by this Court was because the findings of the trial Court, which were conclusive on this Court, established the Government's use of the claimant's property without disputing his title or denying his right to compensation, and because an Act of Congress authorized the taking involved in that case. This Court said in part:

> "We think the Circuit Court and the Circuit Court of Appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to the defendant's retaining posses-

sion of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and, if left in its possession, payment would be recommended for such use.

* * * * * * *

"While the Government claimed the right to thus take and use the property, it nevertheless held it *without denying the right of the owner to compensation*" (pp. 232-233). (Our italics.)

(*b*) The opinion of the Circuit Court of Appeals in the *Buffalo-Pitts* case referred to and apparently relied upon the following language in the opinion of Mr. Justice Brewer in the *Lynah* case:

"The rule deducible from these cases is that when the Government appropriates property which it does not claim as owner, it does so under an implied contract that it will pay the value of the property it so appropriates." (U. S. *v.* Lynah, 188 U. S., 445, at p. 464.)

This language must, however, be considered in view (1) of the *facts* of the *Lynah* case, (2) of the *language used elsewhere in the opinion in that case,* and (3) of the *other and more recent decisions of this Court.*

(1) In the Lynah case the Government had appropriated property belonging to the plaintiffs, by flooding their land in the course of making a public improvement. The Government did

not deny the title of the plaintiffs and there was no question at any stage of the case, but that if compensation was to be paid, the plaintiffs were the persons entitled thereto. The Government did not claim that through any contract entered into with any third person it had the right to flood the plaintiff's lands and pay or give credit to the third person for the value of the property taken. Mr. Justice Brewer, who delivered the opinion of the Supreme Court in the Lynah case, thus summarized the position of the Government:

> "The government did not deny the title of the plaintiffs. It averred in the answer simply that it had 'no knowledge or information sufficient to form a belief,' but did not couple such averment with any denial, nor did it pretend that it *owned* the property or had a *paramount proprietary right to its possession.* It did not put in issue the question of title, but rested upon a denial that the acts its officers had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. *Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs.* It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable the statute of limitations had worked a bar. * * * While there was no formal admission of record that the land belonged to the plaintiff's, the case was tried alone upon the theory that the government could not be held responsible for what it had done" (pp. 460-1). (Our italics.)

It will be noticed that Mr. Justice Brewer in the passage from his opinion quoted above, pointed out that the Government did not claim either (a) to *own the property* or (b) to *have a paramount proprietary right to its possession,* thus distinguishing between *ownership* and a *paramount proprietary right to possession.* In the case at bar while the Government did not claim to own the property, it did claim to have a paramount proprietary right to its possession as against the petitioner and without any obligation to pay the petitioner.

Moreover, the opinion of Mr. Justice Brewer refers specifically to the fact that the Government did not "set up any title to the property antagonistic to that claimed by the plaintiffs." In the case at bar the reverse is true—indeed, the only claim which was set up was absolutely antagonistic to petitioner's, namely, a claim that the government had under its contract with the Hubbard Building & Realty Company a right to take petitioner's property without payment to petitioner.

(2) Mr. Justice Brewer in his opinion in the Lynah case discussed practically all of the cases theretofore decided by the Supreme Court which involved a determination as to what facts establish a taking by the Government as sovereign upon an implied contract to pay its value, and what facts establish a mere tortious taking. The opinions in each of the cases thus cited contained a discussion as to whether there was or was not an implied contract between the Government and the owner of the property to the effect that com-

pensation was to be paid the owner or whether the facts showed that there was no meeting of the minds, so that the taking was tortious. Thus Mr. Justice Brewer quoted from the opinion of Mr. Justice Gray in the case of *Hill* v. *U. S.*, 149 U. S., 593, in which Mr. Justice Gray, referring to the cases of *U. S.* v. *Great Falls Manufacturing Co.*, 112 U. S., 645; *Hollister* v. *Benedict & B. Manufacturing Co.*, 113 U. S., 59, and *U. S.* v. *Palmer*, 128 U. S., 262, in which the United States was held upon implied contracts to pay the value of property taken, said:

> "But in each of these cases *the title of the plaintiff was admitted* and in none of them was any doubt thrown upon the correctness of the decision in Langford's case. * * * Here the claimants never authorized the use of the patent right by the Government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. * * * The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close where the mind of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort" (pp. 459-460).

On the other hand, Mr. Justice Brewer quoted from the opinion in the case of *U. S.* v. *Palmer*, 128 U. S., 262, among other cases referred to by

him, where the facts showed a transaction constituting a contract and not a tort, as follows:

> "No tort was committed or is claimed to have been committed. The Government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under the lease" (pp. 463-4).

(*c*) That the mere fact that the Government did not claim to *own* the property taken by it is not in itself sufficient to constitute the taking one as sovereign or to create an implied agreement to pay to the owner the reasonable value of the property, where the circumstances show that the Government did not expect to pay the owner for the property, is established by the recent decision of this Court in the case of *Harley* v. *U. S.*, 198 U. S., 229. In that case the Government used a patent device which it did not claim to own, but the circumstances showed that the Government did not intend to pay the owner and did not expect that he would ask for remuneration, for the reason that he was an employee of the Government. On these facts this Court held that there was (*a*) a mere tortious taking and use of the device, and that (*b*) no suit could be maintained against the Government for such tortious use. The Court said that the fact that there was no meeting of the minds of the parties distinguished the case from *McKeever* v. *United*

States, 14 Ct. Cl., 396, and *United States* v. *Lynah,* 188 U. S., 445.

Finally, in the *Buffalo-Pitts* case this Court referred with approval to and reaffirmed the ruling laid down in the *Harley* case. *(United States* v. *Buffalo-Pitts Co.,* 234 U. S., 228, at pp. 232-233.)

From the foregoing analysis of the *Lynah* case and the other cases referred to, it seems clear that the only proposition, for which the *Lynah* case can be said to be authority, is that there is a presumption that the Government takes property as sovereign and impliedly agrees to pay the reasonable value thereof to the owner, when it appears that the Government has appropriated property and (in the language of the *Lynah* case) the Government does not "pretend that it *owned* the property or had a *paramount proprietary right to its possession,*" and the Government does not "*set up any title to the property antagonistic to that claimed by the plaintiffs.*"

It is also clear, that where it appears as it did in the *Harley* case *(supra),* that although the Government admitted that it did not own the property, it claimed or believed that it had the right to use it without paying the owner, the taking must be held to be not upon an implied agreement to pay the owner, but, on the contrary, must be held to be tortious.

The question raised in the present case is not whether the Government was *competent* to take the property *as sovereign,* but whether *it actually did so take the property.*

While the Government did not claim to be the *owner* of the plaintiff's property, it did claim to

have the right, *by virtue of its contract with the Hubbard Building & Realty Company and the indebtedness owing by the Hubbard Building & Realty Company to the Government,* to take the property without any payment to the owner, but merely upon *crediting,* upon the indebtedness of the *Hubbard Building & Realty Company* to the Government, the *alleged value* of the property fixed by a Government employee in accordance with the provisions of the Hubbard Building & Realty Company contract, such amount being $11,578, *which was $3,500 less than the actual and reasonable value of the property as found by the Committee,* which was $15,000. (Findings of Committee, 17, 18, 19, 26, 32, fols. 75, 78; 82, 87.)

It is difficult to see how any claim could partake more of a proprietary nature and less of the character of a taking as sovereign. The whole theory of the taking as sovereign is that the Government takes the property, not because it has any lien upon it or title to it or contractual claim of any kind, but merely because as sovereign it has use for the property, to which except for the fact of the sovereignty it would have no right.

The situation in the present case, however, is the exact reverse in every respect of a taking as sovereign, and is exactly such a claim as might be made by any individual who had entered into a contract containing the clause in question. It is a claim that the Government—

1.—Was not bound to pay or credit the plaintiff at all;

2.—Was not bound to *pay* the Hubbard Building & Realty Company anything;

3.—Had what amounted to a lien upon the property to enforce payment of indebtedness of the Hubbard Building & Realty Company to the Government; and

4.—Could take the property on giving a credit to the Hubbard Building & Realty Company, not of the *actual or reasonable value,* but merely of the value *as fixed by an officer of the Government at an amount which was much less than the actual value.*

As a matter of fact, practically all of the authorities cited by the respondent on its original writ of error to the Circuit Court of Appeals, in support of the claim that the Government had the right to take the property of the petitioner under paragraph 33 of the contract between the Government and the Hubbard Building & Realty Company, and credit the value thereof as fixed by the Government engineer upon the debt owed by the Hubbard Building & Realty Company to the Government, were cases involving building contracts *between private persons.* The claim urged upon the Committee and upon this Court by respondent's counsel was that the Government had the right to take petitioner's property upon crediting the Hubbard Company with the value as fixed by the Government engineer, on the theory that the petitioner had constructive notice of the provisions of the contract between the Government and the Hubbard Building & Realty Company. Such a right would, of course, have been purely of a contractual and proprietary nature, such as is ordinarily claimed by private individuals.

It therefore seems clear that the taking of the

petitioner's property was, in the language of the Supreme Court in the *Lynah* case, a taking under a claim on the part of the Government of *"title antagonistic to that claimed by the plaintiffs,"* and was also under a claim of *"paramount proprietary right to its possession,"* and was not a taking by the Government as sovereign.

II.

Since the taking by the Government was tortious, this plaintiff cannot recover the value of its property from the Government.

All of the cases on the subject of a taking by the Government recognize the fact that in some cases the Government takes property upon an implied contract to pay for it, and in other cases officers of the Government take property without such an implied contract, *and that in the latter case the taking is tortious.* See quotation from the opinion of Mr. Justice Gray in *Hill* v. *U. S.*, 149 U. S., 593, at page 30 of this brief.

From what has already been said under Point I (*supra*) it seems clear that no agreement on the part of the Government to pay the petitioner the value of its property can be implied in the present case and that consequently the taking was not as sovereign, but was tortious. In fact, as we read the opinion of the Circuit Court of Appeals on the first writ of error herein it recognized that the taking was or a least may have been tortious, as it stated:

> "It (the Government) made no proprietary claim, and therefore was bound to pay the real owner for the property *whether the taking was tortious or not.*"

It follows, from the fact that the taking of the petitioner's property was tortious, that the petitioner cannot recover from the *Government* the value of the property, either in an action for damages for the tort or in an action on the common counts.

In the decision of the Circuit Court of Appeals in *U. S.* v. *Buffalo-Pitts Co.*, 193 Fed. Rep., 905, that Court expressed the view that claims may be prosecuted against the United States under the Tucker Act even if sounding in tort. That Court based its ruling on that point upon certain language which had been used by Mr. Justice Brown in *Dooley* v. *U. S.*, 182 U. S., 222, and in the concurring opinion written by the same justice in the case of *U. S.* v. *Lynah*, 188 U. S., 445, at p. 475, and upon the alignment of the vote of the justices of this Court in deciding those and other cases.

There apparently was not called to the attention of the Circuit Court of Appeals at the time of the decision in the *Buffalo-Pitts* case, however, the decision of this Court in *Russell* v. *U. S.*, 182 U. S., 516, to the effect that *the Court of Claims did not have jurisdiction under the Tucker Act over obligations arising from tort.* The ruling made in the *Russell* case upon that point was followed in *Harley* v. *U. S.*, 198 U. S., 229, and has been recently reaffirmed in *U. S.* v. *Buffalo-Pitts Co.*, 234 U. S., 228, at pp. 232-233, as follows:

> *"True it is that under the Tucker act there is no jurisdiction in the court of claims or*

district courts of the United States to recover for acts merely tortious, the statute providing that there shall be no recovery except in cases not sounding in tort. It has been said in the case cited for the government, *Harley* v. *United States,* 198 U. S., 229; 49 L. ed., 1029; 25 Sup. Ct. Rep., 634, that there must be some meeting of the minds of the parties upon the fact that compensation will be made. In that case it was found that there was no demand based upon a convention between the parties, or coming together of minds, for while the plaintiff, an employee of the government in the Bureau of Printing and Engraving, supposed and understood he would be entitled to compensation for certain improvements made in printing presses which were used for many years by the Bureau, the findings also set forth in express terms that it was supposed and understood by the officers of the government that the claimant would neither expect nor demand remuneration, and this fact, said this court, distinguished it from *McKeever* v. *United States,* 14 Ct. Cl., 396, affirmed by this court; also from *United States* v. *Lynah,* 188 U. S., 445; 47 L. ed., 539; 23 Sup. Ct. Rep., 349, and the other cases cited by appellant."

In view of this language, it would seem to be established beyond question that no recovery can be had against the Government to recover the value of the property which has been tortiously taken by the Government.

The effect of the decision of the Circuit Court of Appeals in the present case, therefore, is that the petitioner is thereby deprived of a recovery against the respondent, the only tort feasor

against which it can bring suit for the conversion of its property, and the one which, as between the two (the Government and the respondent), it was agreed should be liable.

III.

No title can be acquired by a tortious taking.

As already pointed out, the decisions of the Supreme Court on the subject of taking of property by the Government, all distinguish between a taking by a Government as sovereign and a taking which is tortious. The language of these opinions indicates that a taking which is tortious is not a taking as sovereign, but that, on the contrary, the two classes of takings are mutually exclusive. We have also pointed out that no recovery can be had against the Government for tortious taking.

In addition to these considerations just adverted to, it seems clear that this Court, in stating that the Government *acquired title to the plaintiff's property*, overlooked the fact that no title can be acquired by a tortious taking of property. *Birdsell and Birdsell Mfg. Co.* v. *Gerhart Shalliol and Feikert*, 112 U. S., 485; *Lovejoy* v. *Murray*, 3 Wall., 1.

In Conclusion.

We recognize the right of the United States Government to take property as sovereign with an implied promise to pay the value thereof; but when the United States Government enters into a written contract by virtue of the terms of which

it may under certain circumstances acquire title to property, then if it attempts to take property by virtue of the contract it is on exactly the same footing as a private individual who makes such a contract, that is to say, if it acts within its rights under the terms of the contract it acquires title to the property, but if it goes beyond its rights under the terms of the contract it does not acquire title to the property.

In the same way, when the Government purports to act in the taking of property by virtue of its rights under a written contract into which it has entered with a private corporation, and expressly disclaims any intention of acting in its capacity as sovereign, or of acquiring any rights except such as it acquires by virtue of such written contract, then it clearly does not act as sovereign and acquires no rights in that capacity. This is no hardship to the Government, for it always has the right to take property as sovereign regardless of any contracts; but it would seem to be only fair that if the Government enters into a contract by which the other party to the contract is bound, then, as long as the Government purports to act under that contract and disclaims any intention of acting otherwise, it is equally bound by the terms thereof and acquires only such rights as accrue to it thereunder.

Respectfully submitted,

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SCHEDULE A.

J. G. White & Co. v. *Ball Engineering Co.*, 223 Fed., 618; 139 C. C. A., 164, Circuit Court of Appeals, Second Circuit. April 13, 1915, No. 214.

"Before LACOMBE, WARD, and ROGERS, *Circuit Judges.*

WARD, *Circuit Judge.*

(1) This is a writ of error to a judgment in favor of the plaintiff for damages for conversion by the defendant of certain personal property specified in the complaint used by defendant in constructing Lock and Dam No. 6 on the Trinity River, Tex. The trial was before a referee, called in Connecticut a "committee" and therefore the only question before us for consideration is whether his findings of fact sustain the judgment. We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find. *Andes* v. *Slauson*, 130 U. S. 435, 9 Sup. Ct., 573, 32 L. Ed., 989; *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S., 489, 32 Sup. Ct., 711, 56 L. Ed., 1177, Ann. Cas., 1914B, 699; *Edenborn* v. *Sim*, 206 Fed., 275, 124 C. C. A., 339.

(2) What seems to us to be the material facts found by the committee were substantially as follows:

July 10, 1906, the Hubbard Building & Realty Company entered into a written agreement with

the United States to construct Lock and Dam No. 6 on the Trinity River, Tex.

Some time in the year 1908 a partnership composed of George A. Carden and P. D. C. Ball, trading under the name of the Ball-Carden Company, placed on the site of the lock and dam a considerable amount of property consisting of machinery, tools, and materials and used the same in constructing the lock and dam until the month of May, 1909.

In April or May, 1909, the partnership was dissolved, Carden transferring all his interest to Ball, who continued the work under the name of Ball Engineering Company until on or about September 8, 1909.

September 9, 1909, work on the lock and dam was discontinued, and October 22d the government, in accordance with its provisions, annulled the contract with the Hubbard Company.

April 2, 1910, the plaintiff, Ball Engineering Company, was incorporated under the laws of Missouri, and P. D. C. Ball transferred to it all of the property memtioned in the complaint.

June 6, 1910, the government entered into a written contract with the defendant, J. G. White Company, Inc., to complete the work.

The government took the property belonging to the plaintiff at a value of $11,578 fixed by the engineer and credited the amount in account of the Hubbard Company. It professed to act under section 33 of the contract with the Hubbard Company, which reads:

> 'Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use

by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge.'

This property the government leased to the defendant, who used the same in completing the work and after completion returned all of it to the government except such material as had been used in construction.

As a conclusion of law, the committee found the defendant had as of July 6, 1910, unlawfully converted the property of the plaintiff mentioned in the complaint of the fair market value of $15,000, for which sum with interest at 6 per cent. from that date the plaintiff was entitled to judgment.

The district judge entered judgment in accordance with the report of the committee, and the defendant has taken this writ of error from the same.

We think the committee and the court below correctly held that the government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as

sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the government was justified in acting as against the plaintiff under the contract with the Hubbard Company. The plaintiff also relies upon a provision in the contract between the defendant and the government to the effect that:

> 'If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and ma-

terial in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.'

We regard this provision as quite immaterial. The defendant is making no claim against the government, and the plaintiff is no more concerned with this contract than it was with the contract between the government and the Hubbard Company.

We have considered this general subject in United States *v.* Buffalo-Pitts Co., 193 Fed., 905, 114 C. C. A., 119, affirmed 234 U. S., 228, 34 Sup. Ct., 840, 58 L. Ed., 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

The judgment is reversed."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 589.

BALL ENGINEERING CO., *Petitioner,*

vs.

J. G. WHITE & CO., a Corporation, *Respondent.*

BRIEF ON BEHALF OF THE UNITED STATES, JOINT PETITIONER.

The case has been so well set out in the petition and brief filed in behalf of the Ball Engineering Company that we have little to add in behalf of the United States.

As a preliminary to the brief we wish to point out that the respondent, J. G. White & Co., with the knowledge that the plant and materials did not belong to the Hubbard Company, and had never belonged to the Hubbard Company, and after negotiations with the Ball Engineering Company for the rental or purchase from that company of said plant and materials had failed to result in agreement on a price, procured possession of peti-

tioner's property with the assistance of a Government officer (upon conditions specifically exempting the Government from liability), and having procured possession of the property of the Ball Engineering Company on the site of the work, the White Company used that property in the completion of the lock and dam. Such action on the part of the respondent obviously amounted to conversion of the property of the Ball Engineering Company unless the United States in some way obtained the right to the property of the Ball Engineering Company on the site and transferred said right to the White Company.

The Circuit Court of Appeals, as well as the lower court, rejected the theory on which the Government and the respondent actually proceeded in seizing the petitioner's property and therefore the only way in which the respondent can escape liability for conversion is on the theory that the Government *did* acquire title to the property of the Ball Engineering Company under the right of eminent domain.

In the argument of the case before the Circuit Court of Appeals brief was submitted on behalf of the United States as *amicus curiae,* but believing that the decision below is erroneous and that this ruling to the effect that the United States is liable on an implied contract where property is taken by one of its agents under the circumstances disclosed in this record will have an important and detrimental effect on the rights of the United States under contracts of this character, the United States has joined in the prayer of the petition of the Ball Engineering Company for the granting of a Writ of Certiorari in this case, and that the decision of the Court below is erroneous, it begs leave to submit the following suggestions:

POINT I.

Where the case is not founded on the Constitution of the United States or a law thereof, or a regulation of an Executive Department, no recovery can be had if the case be one sounding in tort.

(*a.*) In United States *v.* Buffalo Pitts Co., 193 Fed. 905, 908, 909, the Court of Appeals analyzed Justice Brown's decision in Dooley's case, 182 U. S. 222, and his concurring opinion in United States *v*, Lynah, 188 U. S. 445, 474, and reached the following conclusion:

> "Accordingly we think the judgment below right, whether it rested on an implied contract of the Government to pay within the opinion of Mr. Justice Brewer in the Dooley Case or upon its constitutional obligation within the opinion of Mr. Justice Brown."

In its first decision of the case at bar, the Circuit Court of Appeals (223 Fed. 618, 620), said:

> "It (the Government) made no proprietary claim and therefore was bound to pay the real owner for the property, whether the taking was tortious or not."

(*b.*) It may be assumed that this statement of the law is correct, although it has never been adopted by this Court, but we deem it necessary as briefly as possible to consider the authorities.

(*c.*) It is true that in the Dooley Case, Justice Brown expressed the view that the limitation "cases not sounding in tort" in the Tucker Act applies only to actions for damages, so that a plaintiff can, as regards the United States, waive a tort and sue on the common counts; but

the remark was a mere dictum, for he concludes his opinion by holding (182 U. S. 228) that whether the importer could waive the tort and sue on an implied contract was immaterial as the case was one **founded on a law of Congress.** This is brought out by the most recent decision of this Court in this class of cases—United States *v.* Emery, 237 U. S. 28, 32—where the Court said:

> "However gradually the result may have been approached in earlier cases, it now has become accepted law that claims like the present are 'founded upon the revenue law.'"

It is further shown by the case of Russell *v.* United States, 182 U. S. 516, 530, 535 (a decision in the same volume as the Dooley Case, and in which Justice Brown joined), where the Court said:

> "This Court has held that under the Act of March 3, 1887, 24 Stat. 505, c. 539, defining claims of which the Court of Claims had jurisdiction, the Court had no jurisdiction of demands against the United States founded on torts. Schillinger *v.* United States, 155 U. S. 163; United States *v.* Berdan Fire-Arms Co., 156 U. S. 552. In other words, to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—'a coming together of minds.'"

And again in conclusion (p. 535)

> "This doctrine may be technical. If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued

in an action sounding in tort, this Court has declared, as we have seen."

As to the Lynah case, it is true that Justice Brown repeated the remarks made by him in the Dooley Case (188 U. S. 475), but this repetition was likewise a dictum, for he held that the case, being one of a taking as a sovereign of private property for public uses, was founded on the Constitution of the United States, so that no implied contract was necessary. Even so limited, the majority of the Court did not agree with him, but placed the decision on the ground of an implied contract, and in Peabody *v.* United States, 231 U. S. 530 (which was either a case of taking under the power of eminent domain, or nothing), the Court said (231 U. S. 539):

> "The suit must rest upon contract, as the Government has not consented to be sued for torts, even though committed by its officers in the discharge of their official duties * * *; and a contract to pay cannot be implied unless there has been an actual appropriation of property."

(Citing among other cases Russell *v.* United States, *supra*). In the Peabody case the officers acted under authority of an Act of Congress.

However, we have no disposition to question the correctness of Justice Brown's views. We only desire to call the Court's attention to their limitations, and to the firm attitude of this Court from the beginning up to the present day on the position that no implied contract can be set up against the United States in a case sounding in tort.

(*d.*) The Russell case, *supra,* was followed in Harley's Case, 198 U. S. 229, where the Court excluded from the jurisdiction "those contracts **or obligations** that the law is said to imply from a tort" (198 U. S. 234). In Juragua Iron Co. *v.* United States, 212 U. S. 297, 309, Russell's and Harley's Cases are relied on where there was clearly a taking for public use. It was held that, even if the laws of war did not justify the taking, it was a mere tort and hence "a claim against the Government for **compensation** on account thereof would make a case "sounding in tort." (The action was one to recover the value of the property taken, without damages.) In Crozier *v.* Krupp, 224 U. S. 290, 303, 304, Russell's and Harley's Cases are again affirmed, and the rule is stated that in case of infringement of a patent,

> "* * * the power to sue the United States for redress did not obtain unless from the proof it was established that a contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers."

It was held that the United States by statute had now authorized the appropriation of such property as sovereign, and payment therefor. In United States *v.* Buffalo Pitts Co., 234 U. S. 228, 232, the Court again stated that there could be no recovery for acts merely tortious, repeated the distinction taken in the Lynah Case between the assertion of a proprietary and of a sovereign right, and placed its decision on the Act of Congress, and the Government's use of the claimant's property without disputing his title and without denying his right to com-

pensation. Finally, in New Orleans-Belize S. S. Co. *v.* United States, 239 U. S. 202, 206, 207, the Court reaffirmed the position taken in its prior decisions.

It therefore appears clearly and emphatically, from a long line of decisions of this Court, that unless the case is founded on the Constitution or on some law of the United States, no recovery can be had in a case sounding in tort.

POINT II.

The claim of the Ball Engineering Company against the United States, if any, does not arise under the Constitution, and, therefore, necessarily is a case sounding in tort.

(*a.*) There is no claim made that the case is founded on any law of the United States or any regulation of an Executive Department. It must, therefore, either be founded on the Constitution, or be on an implied contract or for damages. If, however, the United States did not rightfully take possession of the property under the Constitution, it must have acted under the provisions of the contract with the Hubbard Company. Since, however, the Circuit Court of Appeals has decided that it had no such right under the Hubbard contract, its action or that of its officers must have been tortious, and the claim of the Ball Engineering Company against it, if any, must have been one sounding in tort.

(*b.*) The question is, therefore, whether the claim arose under the Constitution; that is, since the Fifth Amendment is the only provision of the Constitution

claimed to be applicable, whether the United States took the property of the Ball Engineering Company for public use under the power of eminent domain.

We are not aware of any power in the officers of the United States to take property for public use in times of peace without the authority of an Act of Congress or of a regulation having the force of law (a condition which existed in the Buffalo Pitts Case, but does not exist here). Waiving this point, however, the Lynah Case, *supra*, has clearly stated the conditions under which the United States will or will not be held to have taken property under the Fifth Amendment, and the statement was affirmed in the Buffalo Pitts Case. Where the United States, not denying the title of the claimant, asserts its right to take his property by virtue of a paramount governmental right, it proceeds under the power of eminent domain. Where, however, it is not asserting a governmental right, but claims that its right to the possession or ownership of property is superior to that of the claimant by virtue of the ordinary rules of private law, there it is not asserting its overriding right of sovereignty, and if its title be defective under the law it has invoked, its action is merely tortious and *damnum absque injuria*. Moreover, whether the United States was, in any particular case, asserting its sovereign right depends upon its intent as gathered from all the facts. As said in the Peabody Case, *supra* (231 U. S. 538, 539):

> "But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the Government to impose it."

(*c.*) Applying these principles to the case at bar, the findings seem to be inconsistent with any other view than that the Government intended merely to assert a proprietary right arising out of the rules of private law, and had no notion of asserting a sovereign title, paramount to the admitted right of the claimant. This clearly appears, as it seems to us, from a comparison of finding 6 (Rec. 36)—made to conform to the decision of the Circuit Court of Appeals upon the first appeal—with the prior findings. There seems to be a complete *non sequitur*—a material gap which has not been bridged. All of the other findings are emphatic to the effect that the United States took possession of the property under the provisions of paragraph 33 of the Hubbard specifications and not otherwise. The answer of the White Company so alleged (Rec. 15), and all the evidence without any exception was to the same effect. The White Company requested the United States to proceed under this paragraph (Rec. 64), the United States had bound itself to do so at the White Company's request (Rec. 79), the Ball Engineering Company was notified that the United States claimed the right under paragraph 33, and that it did not recognize any title in the Ball Engineering Company (Rec. 94, 95), the Hubbard Company was directly notified to the same effect (Rec. 101), and the Ball Engineering Company was warned that the United States, having taken physical possession under the terms of the Hubbard contract, would treat any attempt to remove the property as a trespass Rec. 107). Nothing can be more certain, therefore, than that the United States intended to take possession, and did in fact take possession, under a claim of superior right arising out of the provisions of paragraph 33 of the Hubbard specifications.

Apparently the Circuit Court of Appeals took the same view at the first hearing, for it said (223 Fed. 620):

> "It" (the United States) "professed to act under Section 33 of the contract with the Hubbard Company."

That Court surely cannot have meant to say that the United States was merely using paragraph 33 as a cloak while in reality intending to assert and in fact asserting its sovereign power of eminent domain; and just as surely that Court cannot have meant to hold that because the United States was wrong as to the validity of the right under which it acted, it must be taken to have acted under its sovereign right of eminent domain, whether it intended to or not, for such a holding would be directly contrary to the law as repeatedly laid down by this Court.

(*e.*) The decision of the Circuit Court of Appeals seems to rest upon the statement that, although the United States intended to act and did act under paragraph 33 of the Hubbard specifications, yet it did not thereby make any proprietary claim. With great respect for the opinion of that Court, we are unable to understand what a "proprietary claim" would be, if this was not one. The claim of the United States fell and was intended to fall under the following formula: If A make a contract with X by which X agrees to erect a building for A, and the contract contain a provision that, on X's default with annulment of the contract, A shall have the right to take possession of all materials, etc., prepared for use or in use in the prosecution of the work and M, a subcontractor under X, brings materials, etc., on the *situs*, using them in the prosecution of the work, then A on annulment has the right to take possession of

M's materials, etc., M for this purpose being merely X's agent (Rec. 95). Can there be any doubt that this was the consistent position of the United States? But this formula is one of private law and is applicable to private persons as much as to the United States. No claim was made that any statute gave the United States special rights, and the right of eminent domain was never even hinted at. All that it was intended to assert, and all that was in fact asserted was that under the general law of contracts and of agency the United States—like any private person in its situation—had a right to the possession of the materials. Such a claim is necessarily one of proprietary right—of a superior right of ownership or of possession under the rules of private law. Hence the possession, if not justified by those rules, was tortious. and no contract for compensation can be implied against the United States.

(*f.*) There are certain special features of the case at bar bearing upon its merits, irrespective of technical considerations, which, we believe, should be called to the Court's attention. The defendant in the case is in reality the Surety Company which was surety on the contract with the Hubbard Company with the United States. In order to minimize its loss on the Hubbard contract, it took over its fulfillment, and employed the White Company as its agent for this purpose. Its general counsel has appeared as attorney of record for the White Company (Rec. 21). It got the benefit of the credit given the Hubbard Company by the United States when it took over the materials, etc., since such credit reduced the amount for which the Surety Company was liable. For this reason the United States insisted on the provision in the White Company contract (Rec. 79, 80), in effect guaranteeing the United States against any claim by the

Ball Engineering Company. How, it may well be asked, is the exaction of such a guaranty consistent with the theory that the United States was proceeding under the power of eminent domain? What is the possible advantage of indemnity against the exercise by the sovereign of a paramount right? In this respect, as in every other, the Russel Case, *supra*, seems decisive. In that case the United States believed that the Krag-Jorgensen patent included legally the particular device on which Russell's claim was founded. Nevertheless, it took an indemnity. Of this the Court said (182 U. S. 535):

> "As he himself" (the Commissioner of patents) "said, 'Questions of infringement belong to the Courts.' And because such questions are for the Courts the Ordnance Office, no doubt, took indemnity from the Krag-Jorgensen Company, not in concession of petitioner's claim, but for protection against it, if protection should be necessary, and whether it would be or not the Ordnance Office very naturally resolved not to determine. The prudence which takes a bond against a claim cannot be said to constitute or raise a contract in favor of the claim—cannot be said to have intended to create the liability which was meant to be forestalled."

Then, when the White Company had completed the contract, and the United States consequently offered to turn back the materials, etc., to the Hubbard Company, the Surety Company objected and the offer was withdrawn (Rec. 113-117). The result of all this is, according to the decision of the Circuit Court of Appeals, that, inspite of the bona fide efforts of the United States to assert only the rights given it by contract, and to protect itself if the Courts should decide that this assertion

was unfounded, the Ball Engineering Company can recover from the United States, which in turn would be compelled to assert a claim against the White Company; because clearly a judgment in favor of the Ball Company against the United States would destroy the effect of the provision in the White Company's contract. Surely there is nothing in the case so explained which would justify this Court in departing from the plain intent of the parties and in holding that the United States claimed, not the right which it constantly asserted, but a right which, so far as the evidence shows, it never had in mind.

Respectfully submitted,

JOHN W. DAVIS,
Solicitor General.

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In The

Supreme Court of the United States.

October Term, 1917.

No. 589.

THE BALL ENGINEERING COMPANY,

Petitioner,

vs.

J. G. WHITE & COMPANY, INC.,

Respondent.

Brief on behalf of Respondent, in opposition to Petitioner's Application for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT.

This action was brought in May, 1911, in the District Court for the District of Connecticut for damages for the unlawful seizure and conversion of certain personal property consisting of machinery, plant and materials of the value of fifteen thousand dollars ($15,000) located at or near the site of Lock and Dam No. 6 on the Trinity River, Texas.

On July 10, 1906, the Hubbard Building and Realty Company entered into a written contract with the United States

to construct Lock and Dam No. 6 on the Trinity River, Texas, and gave the usual bond to the United States. This improvement was authorized by the General Appropriation Act of March 3, 1905, and the contract so recited.

It appeared that after various changes in the ownership of the Hubbard Building and Realty Company from 1906 to 1908, one George A. Carden in August, 1908, became interested in said Company, and its President. Carden was also during this time, and from 1905 to May, 1909, in partnership with one P. D. C. Ball, doing a contracting business under the name of the Ball-Carden Company, and Ball was also in the contracting business by himself in the name of the Ball Engineering Company, and later, in April, 1910, incorporated the business under the same name, The Ball Engineering Company, and was its President, and the owner of 498 out of 500 shares of its capital stock (Findings, Nos. 3, 5, 7, 8 and 9, Record, pp. 24 to 26).

In 1908 and 1909, during the progress of the work, and while the contract was in force, the property in question was placed on the site of Lock and Dam No. 6. The partnership, Ball-Carden Company, brought it there, and it was bought with Ball's money. It was used in the actual construction of the Lock and Dam.

Work did not progress satisfactorily under the various ownerships of the Hubbard Building and Realty Company. On August 21, 1908, Carden, who with his associates had become interested in the Company, as president of the Hubbard Building and Realty Company, made an application in writing in the name of the Hubbard Building and Realty Company for an extension of time for the completion of the work. An extension of eight months was granted. About May 29, 1909, Carden made a second and similar application in writing in the name of the Hubbard Building and Realty Company and another extension was granted (Finding, No. 6, Record, p. 25).

In 1908 and 1909, the plaintiff's assignor, Mr. P. D. C. Ball, at first under the name of the partnership of Ball-Carden Company, and afterwards under the name of Ball Engineering Company, was in charge of and doing all of the actual work and furnishing material in the construction of the Lock and Dam (Findings, Nos. 5, 7, 8 and 9, Record, pp. 25 and 26).

On dates beginning January 4th, 1909, and ending September 8th, 1909, ten checks were issued by the Government in payment for all of the work performed under the contract during said period. These checks were issued monthly and covered the value of the work performed, as estimated by the Government engineer, less the retained percentage withheld by the Government according to the terms of the contract. Each of these checks bore the following endorsements: "Hubbard Building & Realty Co., by George A. Carden, President," and "Pay to the order of National Bank of Commerce," signed "P. D. C. Ball" (Finding No. 12, Record, p. 27).

Each of said checks bore on its face the following statement: "State object for which drawn," under which the following further statement appeared on each of said checks: "Constructing lock and dam No. 6, Trinity River, Texas."

The circumstances under which this Government work was performed by the plaintiff's assignor, Mr. P. D. C. Ball, were such, up to the time of his abandonment of the work, as resulted in his personally receiving all of the money paid by the Government after January 4th, 1909, when and as paid by it (Finding No. 12, Record, p. 27).

On July 24, 1909, Carden assigned to Ball all his interest in the partnership property including the property in question. Later Ball transferred it to The Ball Engineering Company, the corporation which succeeded the Ball Engineering Company, of which he was the sole owner (Findings, Nos. 3 and 7, Record, pp. 24 and 26).

On September 9, 1909, work upon the Lock and Dam was abandoned by The Ball Engineering Company. On October 22, 1909, notification of the abandonment of said contract pursuant to its provisions was given to the Hubbard Building & Realty Company by letter of that date signed by A. E. Waldron, U. S. Engineer Officer in Charge (Finding, No. 11, Record, p. 27).

On June 6, 1910, the United States Government took possession of said property, and notified the Hubbard Building & Realty Company by letter of that date of said action. The Government Engineer from this time on refused to allow the contractor or any of its agents or employees to disturb its possession of said property (Findings, Nos. 17 and 18, Record, pp. 30 and 31).

Paragraph 33 of the original specifications contained the following, to wit:

> "33. ANNULMENT. In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or acquired privileges, under purchase, at a valuation to be determined by the Engineer Officer in Charge."

On June 8, 1910, Mr. Ball by letter to Captain A. E. Waldron, U. S. Government Engineer, claimed that

> "the property in question does not belong to the Hubbard Building and Realty Company, but is the personal property of Mr. P. D. C. Ball, and Mr. Ball does not agree, nor consent to the use of any of his property, until a satisfactory arrangement has been made with the Government or the J. G. White Company as to the purchase price of the material and the rental value of the plant as may be needed by the Government, and protests against

either the J. G. White Company or the United States Government taking any manner of possession of any of the property until Mr. Ball is paid for it." (Finding, No. 16, Record, pp. 29 and 30; Defendant's Exhibit No. 2, Record, p. 96.)

To this letter the Government Engineer replied by letter dated June 9, 1910, acknowledging receipt of Mr. Ball's letter, and briefly stating in answer thereto:

> "Any attempt to remove any of the above listed items will be considered as a trespass, as the Government has actually taken physical possession of the property under the terms of the annulled contract." (Finding, No. 17, Record, pp. 30 and 31; Defendant's Exhibit No. 24, Record, pp. 103 to 107, at 107.)

On June 6, 1910, the Government entered into a written contract with the respondent to complete the unfinished work on said Lock and Dam. On that day, to wit, June 6, 1910, the United States Government leased said property to the respondent to use in completing the work, for which the respondent was to pay a monthly rental to the Government. (Findings, Nos. 15, 19 and 24, Record, pp. 29, 31 and 32.)

On July 18, 1910, the respondent receipted to the Government for the property so received by it (Finding, No. 21, Record, p. 31). On July 6, 1910, the respondent began work, and paid the United States Government a rental of Three Hundred Eighty Dollars per month, the total rental so paid amounting to the sum of about $2,000.00, and on the completion of said work returned all of said personal property to the United States. (Finding, No. 25, Record, p. 32; Plaintiff's Exhibits, "D" and "E," Record, pp. 111 to 115.)

In the final account and settlement between the contractor, the Hubbard Building & Realty Company, and the United States Government, the Government gave the Hubbard Building & Realty Company credit for the value of said personal

property and materials at the valuation determined by the Engineer Officer in Charge. After the deduction of this credit a balance was by the account shown to be due from the Hubbard Building & Realty Company to the United States. (Finding, No. 26, Record, p. 33.)

Proceedings In the Courts Below.

The Committee who heard the case and the District Court held that the respondent had unlawfully taken and converted the property in question.

On appeal the Circuit Court of Appeals for the Second Circuit, on April 13, 1915, reversed the judgment of the District Court and said:

> "We think the Committee and the Court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the constitution. It made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer jusitfied by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company.

"We have considered this general subject in U. S. vs. Buffalo-Pitts. Co., 193 Fed. 905, 114, C. C. A. 119, confirmed 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

"The judgment is reversed."

Vol. 223, Fed. Rep. 618.

The case went back to the U. S. District Court and to the committee, the same evidence was by stipulation submitted to the committee and no new trial was had, and the committee simply amended his conclusion of law to conform to the foregoing decision of the Circuit Court of Appeals. The District Court gave judgment for the respondent following the decision of the Appellate Court. The petitioner then brought another appeal to the Circuit Court of Appeals.

On the second appeal the Circuit Court of Appeals on April 17, 1917, affirmed the judgment below and its previous decision. After reviewing the entire record, it said:

"Having examined the record presented by this writ, we are of opinion that it differs in no material fact from that considered in 233 Fed. Rep. 618. Therefore the decision then made is binding, the issues have been adjudicated, and the judgment is confirmed, with costs."

It is from this judgment that the petitioner has brought its petition to this Court for a writ of *certiorari*. The error assigned is the failure of the Circuit Court of Appeals to hold and decide that the taking by the Government was a proprietary taking and tortious, rather than a taking as a sovereign subject to the right of compensation.

BRIEF.

I.

THIS COURT HAS REPEATEDLY HELD THAT THE POWER OF THIS COURT TO ISSUE WRITS OF CERTIORARI IS A POWER WHICH SHOULD BE SPARINGLY EXERCISED, AND ONLY IN CASES OF A CONFLICT BETWEEN TWO OR MORE COURTS OF APPEAL, OR BETWEEN COURTS OF APPEAL AND THE COURTS OF A STATE, OR CASES AFFECTING THE INTEREST OF THIS NATION IN ITS INTERNAL OR EXTERNAL RELATIONS, OR CASES OF VERY GRAVE IMPORTANCE.

Forsyth vs. Hammond, 166 U. S. 506, 514;
U. S. vs. Rimer, 220 U. S. 547;
Fields vs. U. S., 205 U. S. 292.

There is no claim here and indeed there cannot be, that there are conflicting decisions on the point in question between the Circuit Courts of Appeal of different circuits. No cases have been cited in support of any such claim, and the cases of Buffalo-Pitts. Co. vs. U. S., 193 Fed. Rep. 905; Tinker and Scott vs. U. S. Fidelity and Guaranty Co., 169 Fed. 211, and this case are all in accord.

Nor is there any conflict in the decisions of the Circuit Court of Appeals for the Second District and the decisions of this Court. In the Buffalo-Pitts. Case, reported in 234 U. S. 218, this Court was clearly in accord with the Circuit Court of Appeals of this circuit on this precise question, to wit: *Was the taking by the Government in a situation exactly similar a tortious taking?*

The Buffalo-Pitts case is identical with this case. The opinion of this Court in that case was unanimous. It is in accord with the decision of the Circuit Court of Appeals in the same case, and now in the case at hand the same Circuit Court of Appeals in a situation precisely the same has on two different appeals *unanimously* applied the law as laid down by this Court in the Buffalo-Pitts case, and held that there was no tortious taking.

In such cases this Court has many times held that there is no warrant or justification for granting a writ of *certiorari*.

Columbus Watch Co. vs. Robbins, 148 U. S. 267;
American Construction Co. vs. Jacksonville Railway, 148 U. S. 372, 383;
Forsyth vs. Hammond, 166 U. S. 506. 513, 514;
In re Woods, 143 U. S. 202;
Jones vs. Missouri Edison Electric Co., 144 Fed. 765;
Faber vs. Cunard Steamship Co., 59 Fed. 500.

II.

IT IS A WELL RECOGNIZED MAXIM IN THE LAW THAT A PARTY SHALL NOT BE PERMITTED TO TAKE DIFFERENT AND INCONSISTENT ATTITUDES WITH REFERENCE TO THE SAME TRANSACTION, OR TO INSIST, AT DIFFERENT TIMES, ON THE TRUTH OF EACH OF TWO CONFLICTING ALLEGATIONS.

We deem it essential to the proper consideration by this Court of the pending petition that the Court should take notice of the petition which the present petitioner brought to the Court of Claims on May 27, 1916, with reference to this same subject-matter.

The petition in the Court of Claims, which is filed in the name of the Ball Engineering Company, the plaintiff in this case, is sworn to by its president, P. D. C. Ball, and was brought to the attention of the Circuit Court of Appeals on the last appeal to that Court. It involves the identical property and recites the same facts as the complaint in the present suit, with one notable exception—the sixth paragraph of said petition is as follows:

> "That on or about the 30th day of June, 1910, the defendant, with full knowledge that the said personal property belonged to and was the property of the claimant, *took in its sovereign capacity title to and possession*

of the said personal property of the claimant, and used said personal property in the construction of the said public work, to wit, lock and dam No. 6, near Trinity River, Texas."

A certified copy of the petition filed in the Court of Claims is annexed hereto as Exhibit "A."

In short, the present petitioner, in a sworn petition to the U. S. Court of Claims, has been claiming since May, 1916, and now claims that the Government "took in its sovereign capacity title to and possession of the said personal property of the claimant;" in other words, that the Circuit Court of Appeals was right in its first decision, and, therefore, right in its second decision of April 17, 1917.

Under such circumstances the petitioner having elected to sue on this claim in the Court of Claims, will not now be heard to contend in direct contradiction to this position that the Government did not so take this property in its sovereign capacity, and that the decision of the Circuit Court of Appeals was wrong.

The maxim, *"allegans contrari non est audiendus,"* has often been applied by the courts to such efforts on the part of litigants.

"A man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or to insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest."

Brooms Legal Maxims, p. 135;

Railroad Co. vs. McCarthy, 96 U. S. 267, 268;

Smith vs. Boston Elevated Ry. Co., 184 Fed. 389;

Great Falls Nat. Bank vs. McClure, 176 Fed. 208, 211;

Boston Elevated Ry. Co. vs. Paul Boynton Co., 211 Fed. 820;

Harman vs. Northern Securities Co., 197 U. S. 294.

III.

THE CASE AT HAND IS ON ALL FOURS WITH THE RECENT CASES IN THIS COURT OF UNITED STATES vs. BUFFALO-PITTS COMPANY, 234 U. S. 228, AND UNITED STATES vs. SOCIETE ANONYME DES ANCIENS ETABLISSEMENTS, 224 U. S. 303, AND THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE, THAT THE ACTION OF THE GOVERNMENT WAS NOT A PROPRIETARY TAKING OR TORTIOUS, IS IN ACCORDANCE WITH THE PRINCIPLES AND REASONING ADOPTED BY THIS COURT IN THESE CASES.

(*a*) In the Buffalo-Pitts case the facts were exactly parallel. The Taylor-Moore Construction Company was the contractor with the Government. The Buffalo-Pitts Company held title to an engine and appurtenances under a chattel mortgage given by the Taylor-Moore Construction Company at the time of the purchase of said engine by the latter company.

The contract was annulled on June 7, 1905. The finding is, "that the United States on that date took possession of all material, supplies and equipment belonging to said Construction Company, including the said engine and appurtenances, *pursuant to and under the provisions of said contract* with the United States." (Finding, Par. V, P. 17 of Record.) The petitioner in a letter dated August 5, 1905, was duly notified by the Government of this action, letter reading as follows:

"The contract referred to is no doubt the contract between the Secretary of the Interior and the said Company for the construction of certain work in connection with the Honda Project. Under the terms of said contract, in case of default by the contractor the United States is entitled to possession of the contractor's machinery delivered on the ground and if the engine referred to was delivered, the United States has taken possession of it under the terms of the said contract.

"The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States, appears to be set forth in the Act of Congress, approved Feb. 24, 1905 (33 Stat. 811)." (Page 47 of Record.)

Again on September 26, 1905, the Government, by letter, replied to the claim of the Buffalo-Pitts Company:

> "The status of the machinery in question is the same as that of other machinery, tools, stock, etc., belonging to the contractors and taken over by the Government in pursuance of the expressed terms of the contract, and until the work is completed and matters under the contract are finally adjusted, no change in the status of the machinery can be made nor claims thereto recognized." (Pages 51-52 of Record.)

The finding in the Buffalo-Pitts case further showed that on November 13, 1905, the United States entered into a contract with another contractor to complete the unfinished work of the Taylor-Moore Company. The new contractor used the property and finished the entire work on June 21, 1906, and the personal property in question was not used after that date.

The only other testimony offered by the petitioner in that case was by a traveling salesman for the Buffalo-Pitts Company, who testified in a conversation had with the local Government Engineer on the job some time after the Government had taken possession of said property that the latter said that he "thought that their claim was a just one" and that he "thought the Government would pay for the engine." This statement the Government Engineer in his own testimony denied, and the Government Engineer further testified that he stated to the Buffalo-Pitts Company that he "was acting entirely under the terms of the contract with the Taylor-Moore Construction Company * * *;" and that "possession and use of the engine were taken under the terms of the contract with the Taylor-Moore Construction Company." (Page 63 of Record.)

The only finding from this evidence on this point was that, so far as the plaintiff was concerned, it relied upon the fact that its title to the property under the mortgage was not disputed by the Government and upon the representations made to it as testified by its representative. It was not, however, claimed in the case that the statements of the local Government Engineer in this conversation were of any binding force upon the United States, and a careful reading of the entire record shows that the foregoing was the only evidence in the case that had a bearing on, or which in any way explained the finding that the plaintiff relied upon the fact that its title to the property was not disputed by the Government, and that the plaintiff relied upon the representations made to it, and consented to the Government's retaining possession of the property in the expectation on the part of the plaintiff of receiving compensation therefor.

The transaction was the same in the case at hand. The contracts were annulled in the same way and by the same claim of authority based upon the written contracts. In both cases the petitioners asserted title to the property, and protested against the property being used until they were paid for it. The Government took the property in both cases and retained it and delivered it over to the contractor who succeeded to the prosecution of the work. After completion of the work by the last contractor the property was, in both cases, delivered back to the Government on the site of the job. In neither case was there anything to show that the Government expected to use the equipment without compensation. The Government in this case, as in the Buffalo-Pitts case, did not assert any proprietary claim to the property, but insisted always that it could deal only with the contractor, and gave credit for the property taken.

This Court, in its opinion in the Buffalo-Pitts case confirming the decision of the Circuit Court of Appeals, said on pages 232, 233, 234:

"We think the Circuit Court and the Circuit Court of Appeals were right in concluding that under the facts found the United States was liable upon an implied contract.

"In the present case, as we have said, there is nothing to show that the Government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the Government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee.

"It may be said, as contended, that under the contract with the Construction Company the Government had a right to take possession of this engine which was in possession of the Company as mortgagor and by virtue of the terms of the agreement complete the work, but it could not in this manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances we think the former decisions of this court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for a public use, require the Government to make compensation for the use of this engine, and that the facts bring this case within *United States vs. Lynah, supra.*"

In the case at hand the defendant in its answer did set up by way of defense all of the transactions that took place between the Government and the contractor, but it also denied generally the allegation of the complaint that it "unlawfully seized upon said personal property and converted the same

to the use of the defendant." And it will also be borne in mind that the Government in this case had lawful authority to take, as a sovereign, the propety in question. It has been held in connection with similar improvements, authorized by this same Appropriation Act of March 3, 1905, and by other similar Acts that the authority of the Government to act in the premises and to take property in use or relating to these improvements is not confined to such acts, but that the Act of April 24, 1888, c. 194, 25 Stat. 94 (U. S. Comp. St. 1901, page 3525) confers upon the Government the right to take "any land, right of way, or material needed to enable it to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law."

U. S. vs. Certain Lands in Narragansett, R. I., 145 Fed. 654, 657;
Houck vs. U. S., 201 Fed. 867.

(*b*) In United States vs. Societé Anonyme des Anciens Etablissements, 224 U. S. 309, this Court, in discussing the elements of implied contract in a similar situation, said on page 320:

> "But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind."

The Anciens Etablissements case was an appeal from a judgment of the Court of Claims in favor of the petitioner. The suit was brought for the recovery of royalties or damages claimed to be due the petitioner on his contention that the Government used a certain patented invention of the petitioner.

The principal question for determination, both in the Court of Claims and in this Court, was whether the acts of the parties as shown by the correspondence and facts set forth

in the findings were such as to constitute an implied contract, as distinguished from a tort, between the United States and the petitioner, whereby the United States became liable in damages for the alleged use of claimant's patented device. (See Record, p. 8.)

The following facts are taken from the findings in the Record:

The history of the invention of gas checks is traced from an early period to the patent of Colonel DeBange, a French officer. The patented invention came to the attention of a gun foundry board of the United States, authorized by Act of Congress, and was directly brought to the attention of the United States Minister on June 29, 1891, in a letter from Colonel DeBange, the petitioner claiming compensation for the unauthorized use by the United States Government of his invention. The claimant in the same year presented his claim in writing to the Secretary of State at Washington. The petitioner's letter was the subject of official comment between departmental officials, who passed unfavorably upon the petitioner's claim and who took the position that the gun check used by the United States Government was covered by patents which it itself owned, and that, therefore, there was no ground for the petitioner's claim. On January 31, 1894, the claimant again made formal claim to the War Department and Navy Department of the Government, stating its claim and demanding payment for the use of the invention.

On February 10, 1894, the Secretary of the Navy replied to the claimant, acknowledging receipt of the claim and stating that the gas check adopted by the United States Government resembled in certain features the claimant's patented invention, but that it also differed from it materially in certain particulars which were original in the Navy Department. The position of the Navy Department on the petitioner's claim was then stated by quoting in the letter the ruling of the Navy Department, which read as follows:

"NAVY DEPARTMENT,

"Washington, September 3, 1891.

"Sir: I have the honor to acknowledge the receipt of your communication of the 20th ultimo, enclosing copies of correspondence relating to a claim of Colonel De Bange, a retired officer of the French Army, residing in Paris, France, who alleges the use by this Government of certain inventions patented by him in guns and gun carriages.

"In reply I have to state that the Chief of the Bureau of Ordnance, in this department, to whom the communication and accompanying papers were referred, reports as follows:

" 'The bureau has not manufactured, and is not using, any gun carriages which contain principles which could be held as infringing any claims described in U. S. Patent No. 331618.

" 'The gas check which has been adopted for the naval guns of 6-inch calibre and upwards resembles in certain features that described in U. S. Patent 301220, issued to Colonel De Bange. It also differs from it materially in particulars which were original in this bureau.'

"In view of the statement made by the Chief of the Bureau of Ordnance, there appears to be no proper ground for the claim of Colonel De Bange.

"Very respectfully,

"F. J. RAMSEY,

"Acting Secretary of the Navy.

"The Honorable the SECRETARY OF THE STATE."

And the Secretary of the Navy closed his letter by reiterating the position taken by the Government three years before in the following statement:

"As the status of the case has not changed since the date of the Department's letter above mentioned, and as the matter has been previously disposed of by the Department, no further consideration of the case appears to be required."

During all of this time the invention had been used by the United States under the claim that it was the property of the United States under certain patents owned by it. On December 31, 1894, the final communication was forwarded by the War Department to the petitioner in respect to his claim. It advised the petitioner that his claim, if pursued, would probably involve other similar patents in use, and contained the suggestion that he might urge his claim to the Court of Claims.

On January 31, 1895, the Societé filed its petition in the Court of Claims.

The Government in the Anciens Etablissements Case, in its brief filed in this Court claimed the following assignment of error:

> "That the Court erred in failing and declining to hold that the facts disclosed by the correspondence between the parties hereto constituted an infringement or tortious use by the United States of the device alleged to be covered by the patent in suit; and that the Court erred in holding that it had jurisdiction of this cause, as of an implied contract in fact, arising out of the correspondence showing the relation of the parties hereto in connection with the claim in question."

The position of the Government before this Court was that there was never any meeting of the minds of the parties in the suit, and certainly not as to the recognition of any obligation by the Government, or as to any promise on the part of the authoriized officers of the Government to compensate the claimant for such use. The cases of Russell vs. U. S. 182 U. S. 516, and Harley vs. U. S., 198 U. S. 229, were claimed to be directly in point and decisive in favor of the Government. The Government claimed that the Societé made no claim for compensation except as its letter of June 19, 1891, could be considered such a claim, and this letter, if showing any claim at all, was a claim not for an authorized

or permitted use but for "an unauthorized and surreptitious use;" or, in other words, "a tortious use," out of which no implied contract in fact to pay compensation could arise. The Government further contended that no board or authorized officer made any declaration that they were of the opinion that the claimant should be compensated. It was strongly urged that the Government used what it did under a claim of right derived from the Davis Gerdom patents, for which it paid; and that it used the device before any demand or request for compensation was made, without any agreement for compensation, without any intent expressed to give compensation, and without any course of conduct from which an agreement to give compensation could be implied from the mere use.

The Government further argued that when the claim in question was presented to the Departments of this Government the officials were careful not to make any acknowledgment of the Societé's right to compensation; instead, their position as stated to the claimant was that "there appears to be no proper ground for the claim of Colonel DeBange;" that the Department had reached a decision that there was no ground for the claim in question; and that the claimant, having been notified of the Department's action, there was nothing on which to predicate an understanding that the Government would pay for the use of DeBange's invention. And finally the Government claimed that the suggestion in the letter of the Secretary as to recourse to the Court of Claims did not confer any rights upon the claimant any more than it did in the Russell case, and did not bind the Government in any implied promise to compensate the claimant for the use of the invention in question.

This Court, however, after considering the cases of Russell vs. U. S., 182 U. S. 516, and Harley vs. U. S. 198 U. S. 229, held in the Anciens Etablissements Case that an implied contract had been raised to pay for the property.

"It is not possible to review the arguments by which the claimant asserts and the Government denies the sufficiency of the facts as we have related them to constitute an implied contract between the claimant and the Government. The ultimate contention of the Government is that the mere use of the patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, but 'there must be (1) a use of it with the patentee's assent, and there must *also* be (2) an *agreement* or *meeting of minds* on the part of the patentee and on the part of the user *as to compensation for the use,* even though the amount of the compensation be not fixed.' These elements, it is insisted, were present in the *Burdan Case,* which we have seen was relied on by the Court of Claims; they are, it is further insisted, absent in the case at bar.

"But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated. There was doubt as to the extent of it because there was doubt as to how far the devices used were attributable to or belonged to De Bange or whether they constituted an infringement of his patent, and therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it."

In short, the position of the United States in the Anciens Etablissements Case was:

"We deny that we are using your property and advise you that you have no claim; if you still think you have a valid claim against the Government the Court of Claims is open to you."

In the case at hand the Government, never asserting any proprietary right in the property, gave credit to the contractor for the property, thus showing much more clearly than in the two cases previously decided by this Court, and quoted herein, that it recognized a liability for the value of such property.

In the Anciens Etablissements Case this Court said there was doubt and hesitancy as to the extent of the liability and compensation. So, in the case at hand, as the Circuit Court of Appeals said, the Government recognized the wrong person as owner, but clearly showed its attitude or liability to whomever should prove to be the true owner, by crediting the value of the property in the Government account relating to this particular job. In the Anciens Etablissements Case, after the interchanges of communication between the claimant and the Government had ceased, and years afterwards when the claimant had pursued his claim in the Court of Claims against the opposition of the United States, it was established that the property used by the Government *was* the claimant's; *i. e.,* covered by his patents rather than by those owned by the Government. And in the case at hand it developed that the Government was at first uncertain as to its rights to deal with this property under the contract, and that at first it mistakenly interpreted its rights thereunder, but nevertheless continued to hold the property, making no proprietary claim thereto, but crediting its value to the contractor in the account kept relative to this particular improvement.

The case of U. S. vs. Lynah, 188 U. S. 445, was an action against the United States for compensation for the taking of certain real estate in South Carolina. It appeared that in improving the navigation of the Savannah River the Government had built dams which raised the water in the river, backed it up against the embankments, and prevented

the drainage of the plaintiffs' plantation. There was no specific Act of Congress authorizing the appropriation of this specific property. There was no admission of record by the Government that the land belonged to the plaintiffs, and the case was tried on the theory that the Government could not be held responsible for what it had done. In holding that the claimants were entitled to compensation from the Government for the taking, this Court said:

> "It did not repudiate the actions of its officers and agents, but on the contrary in terms admitted that they acted by authority of Congress, and that all that they did was lawfully done. So that if the overflow and destruction of this property was, as we shall presently inquire, a taking and appropriation within the scope of the Fifth Amendment to the Constitution, the jurisdictional question now presented is whether such appropriation directed by Congress created an implied contract on the part of the government to pay for the value of the property so appropriated.
>
> "The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.
>
> "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates." (Pages 461-462, 464.)

In U. S. vs. Great Falls Manufacturing Company, 112 U. S. 645, there were no formal proceedings for condemning the land, rights and privileges, but this Court held that there

was an implied obligation on the part of the United States to make compensation to the owner:

> "The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl vs. United States,* 91 U. S. 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.
>
> "In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose." (Pages 656, 658.)

The attorney for the petitioner admits that the Government did have the right to take. On page 32 of his brief he says:

> "The question raised in the present case is not whether the Government was *competent* to take the property *as sovereign,* but whether *it actually did so take the property.*"

And on page 39, after attempting to distinguish between taking as sovereign and taking under contract he says:

> "This is no hardship to the Government, for it always has the right to take property as sovereign regardless of any contract."

The fact that the Government did take the property is admitted by all, and the petitioner here admits that it had full right to take it. This admission alone is sufficient ground for dismissing the petition.

IV.

IT IS HIGHLY IMPORTANT TO THE GOVERNMENT THAT ITS RIGHT TO TAKE PROPERTY AS IN THIS CASE SHOULD BE UPHELD BY THIS COURT. THE CIRCUIT COURT OF APPEALS HAS TWICE DONE THIS IN THIS CASE, FOLLOWING THE PRINCIPLES AND REASONING LAID DOWN BY THIS COURT IN THE PARALLEL CASE OF THE BUFFALO-PITTS COMPANY. WITH THE LAW SO CLEARLY LAID DOWN BY THIS COURT IN TWO CASES SO SIMILAR, THIS COURT SHOULD PROMPTLY REFUSE TO CONSIDER PLAINTIFF'S PETITION AND PUT AN END TO THIS LITIGATION, WHICH HAS LASTED NEARLY SEVEN YEARS.

If the contentions of the petitioner in this litigation prevail, then this situation is presented:

A contract existing between the United States Government and a contractor for a government improvement with provisions prohibiting the transfer of any interest in the contract, the usual formal conditions, and contractor's bond; parties working under various business names on the job, in the same business as the contractor, and at the same time interested in the contracting corporation, but not appearing of record as owners thereof; requests to the Government for extensions of time for the completion of the work made by the parties doing the work, in the name of the contracting corporation, but at the same time disclaiming liability under

the contract and bond of the contractor, or any obligation with respect to the work; the annulment of the contract by the Government; the taking by the Government of personal property on the site of the improvement, in use by the parties doing the work, and who have been paid by Government checks made payable to the contracting corporation for work under the contract, and who are interested in the contracting corporation and at the same time doing business severally and collectively under different business names; a claim of ownership of some of this property made by one of these parties in his individual name to the Government, and demand that he be paid therefor; a refusal by the Government to surrender possession of the property; a credit given by the Government in its account on this improvement to the contractor with whom alone it has dealt from first to last; completion of the work by the Government under contract with a third party, and a lease of the property by the Government to such contractor for use in completing the work. (Findings, Nos. 3 to 13, Record, pp. 24 to 29.)

In this situation the petitioner says that the Government must be deemed to have acted unlawfully and to have committed a "tortious" taking because credit for the property taken was not given or payment made by the Government to that one of these parties who established actual title to the property at the date of the taking, to wit: The Ball Engineering Company, rather than The Hubbard Building & Realty Company, or the Ball-Carden Company, or Mr. Ball known as the Ball Engineering Company. And that this fact, although there is nothing in the case to show that the Government expected to use the property *without compensation* as in the Buffalo-Pitts case, renders the latter case inapplicable and the taking a tort.

The circumstances surrounding the transaction in this case are of controlling importance. The Government was constructing a lock and dam in a remote region in Texas. Ma-

chinery and material brought there were brought for the use of the Government and were needed by the Government. The Government intended to use such machinery and material as was brought there, if suitable for its purpose, until the work was complete, no matter when or by whom it was completed. Not only is this made evident by paragraph 33 of the specifications, but such is the established practice and custom of the Government; a practice and custom that those dealing with the Government or with the contractor employed on the work must be presumed to have known.

The practice and custom has grown out of the necessities of the case and the sovereign authority of the Government. Government work must be completed and must be expedited. Its enterprises are inaugurated not for private advantage, but for the public welfare. These enterprises are conducted at far distant and inaccessible points, and the mere assembling of the plant and material is often a most difficult and tedious part of the transaction. For the Government to lose the benefit and use of plant and material when once brought to the building site would entail serious loss of time and add greatly to the cost. These well-known and fully recognized conditions make it necessary for the Government in such cases to exercise its sovereign power and take such part of the material and machinery assembled as is required for the work. In doing this, there is no proprietary claim, or claim of prior ownership on the part of the Government. The Government has no intention of depriving any one of his property without full compensation, nor is the Government primarily concerned with the ownership of the property. It makes no difference who is the owner. It needs it and must have it, whose ever it is. It expects to pay for what it gets, but it must have it and must have it at once. There is nothing else for it to do under the circumstances, so it takes what is at hand that was brought there for that use and is required. The questions of ownership and payment can be postponed, about which there can be no serious question, for

the Government is fully responsible and able and willing to pay for what it gets.

Therefore, it follows that the provisions of paragraph 33 of the specifications, so far as they relate to the taking by the Government, do not confer any new or additional power or authority upon the Government; they just state rights and powers that the Government inherently possessed without regard to them. They do not confer and, in fact, do not profess to confer any proprietary rights upon the Government. They just assert that the Government may take, a power it already had.

On the other hand, the provision of paragarph 33 in regard to the valuation of the property is merely an administrative detail, inserted to avoid trouble and exasperating disputes. So far as the property belonging to the contractor is concerned, there can be no question but that this method of arriving at a basis of settlement is valid and binding, and we believe that it is equally binding upon those who are so closely and intimately associated with the contractor as to be reasonably chargeable with knowledge of the provisions of the contract.

We also believe that the facts and circumstances as disclosed by the Record in this case, as referred to above, are of such character as to charge the petitioner with full knowledge of the provisions of paragraph 33, and that it should have been so charged and should have been held to be bound by them.

Carden as President of the Hubbard Company, must be presumed to have had knowledge of the provisions of paragraph 33. Ball, as partner of Carden in The Ball Engineering Company, engaged in the actual construction of the work must be charged with the knowledge possessed by his partner. The knowledge of Ball, as President, director, manager, financial representative and substantially sole owner of the

stock of the Ball Engineering Company, would charge that company with the knowledge possessed actually or constructively by Ball. The reading of the Record (pp. 24 to 29) must convince any impartial mind that Ball was the controlling influence in the Hubbard Company, the Ball-Carden Company and the two Ball Engineering Companies, and it is past belief, in view of the facts disclosed by the Record and particularly the fact that Ball is shown to have received all the fruits of the enterprise from the time when he took it over up to the time it was abandoned by him, that he was in ignorance of the full provisions of the contract, and hence he, and the petitioner through him, should be held to be bound by them.

We, therefore, believe the District Court and the Circuit Court of Appeals were in error in holding that the provisions of paragraph 33 were inapplicable in this case. Of course, if we are right in this, the writ of *certiorari* should be denied, for the petitioner would have no cause of action. But at no time has the respondent rested its case solely upon this contention. Its contention has always been and is, that the Government had the right to take this property and did take it, and, therefore, the possession and use of the plant and material by the respondent was lawful, and it could not be held to have wrongfully converted the property of the petitioner to its own use.

The petitioner has contended that the respondent has changed front in its defense. Such is not the case.

The petitioner in its original complaint paragraphs 5 and 6 (Record, page 9) charges:

> "5. On or about said date of June 1, 1910, the defendant, its servants, agents and employees, over the objections and protest of plaintiff and against plaintiff's express directions, unlawfully seized upon said personal property and converted the same to the use of the defendant.

"6. The said property so seized and converted to defendant's use has never been restored to the possession or use of the plaintiff."

To which the respondent made answer as follows (Record, page 18):

"5. The allegations of paragraph 5 of the complaint are denied.

"6. As to the allegations of paragraph 6, this defendant denies that it ever seized and converted any of said property referred to in the complaint or in this answer to its own use, and further alleges that previous to the commencement of this suit, this defendant as lessee as aforesaid, surrendered possession of the said property to the Government of the United States as the owner thereof, and at the time of the commencement of this suit, and for a long time before, this defendant did not have possession of said property nor any part thereof, and did not assert or claim any right, title or interest therein."

It is submitted that these grounds of defense as originally asserted are broad enough to cover the contention that the Government had lawfully asserted such ownership or control over the property as to render its use by the respondent lawful irrespective of the method by which the Government may have asserted such ownership and control.

If the Record discloses, as we respectfully submit it unquestionably does, that the circumstances under which the Government assumed control of this property were such as to show that the public welfare demanded its use in the furtherance of the public work under construction, then the Government's act in asserting its right to the property was lawful and binding upon both the petitioner and respondent, and the fact that the Government may have claimed that it had the right to pay for the property under paragraph 33 of the contract, cannot destroy, so far as this respondent is concerned, the validity of the act of the Government in taking the property openly and notoriously and assuming full con-

trol over the same, to the extent even of demanding and receiving a rental from the respondent for its use.

The Government was bound, and must be presumed, to have exercised all its power necessary to perfect its title and protect the respondent, and carry into effect its agreement and undertaking with the respondent.

Certainly the Government is in no position now to intervene and attempt to deny the rightfulness of the possession of the respondent, when it gave that possession and vouched for its authority by demanding and receiving rental for the use (Findings, 18, 19, 21, 23 and 24, Record, pp. 31 and 32). We submit that the Government is estopped as against the respondent from asserting that its (the Government's) act in taking possession of this property was tortious.

The Government received back so much of the property as was not used in construction work and receipted to the respondent for the same. For its use the Government must be assumed to have received fair compensation, for its own officers fixed the amount of rental, and the value of the material. The Government is now asking, by joining in this application for the extraordinary writ of certiorari, that the burden of its alleged tortious act should be thrown upon the respondent, who has already given to the Government full and adequate compensation for all benefits it has received. We, therefore, most earnestly insist that no consideration of public necessity or need exists in this case to influence the Court to invoke its extraordinary and discretionary power in granting this application.

The Government should be held to be estopped from asserting in this case that the decision herein, if unreversed, "will have an important and detrimental effect on the rights of the United States." (Petition, p. 18A.)

It is not a party to the suit and the decision of the dispute between the petitioner and respondent cannot directly effect its interests unless indeed, it should be using this case as a

cloak to try to build up its defense against the suit of the petitioner now pending against it in the Court of Claims, to which the attention of the Court has been heretofore called. The burden of the defense of that suit should not be thrown on the respondent.

We have already adverted to the fact that in filing that suit the petitioner has in terms accepted and adopted the conclusions of the Circuit Court of Appeals in this case, so we most respectfully and earnestly submit that neither the petitioner nor the Government, as *amicus curiae,* comes into this Court with "clean hands" and for that reason as well as on the merits, the petition should be denied.

Respectfully submitted,

LEWIS SPERRY,
HARRY W. REYNOLDS,
J. KEMP BARTLETT,
Respondent's Attorneys.

EXHIBIT A.

IN THE

UNITED STATES COURT OF CLAIMS.

No. 33,292.

BALL ENGINEERING COMPANY
A CORPORATION
COMPLAINANT

v

THE UNITED STATES
DEFENDANT.

PETITION
"(Filed, June 8, 1916.)

"Claimant respectfully shows:

"1. That it is a corporation duly incorporated on or about the 2d day of April, 1910, under the laws of the State of Missouri, and is a citizen and resident of said State, having its domicile and principal place of business in the City of St. Louis, in said State.

"2. That on or about the 30th day of June, 1910, the claimant was the owner of and entitled to the possession of certain personal property located on the site, being the land

owned and controlled by the defendant, of lock and dam No. 6, on Trinity River, Texas, which lock and dam the Hubbard Building and Realty Company had, under contract with the defendant, agreed to erect and construct.

"3. That the said personal property of the claimant was as follows:

"One anvil; 2 1-yd. bottom dump concrete buckets; 10 1½-yd. Western dump cars; 10 Koppell 1-yd. cars; 1 derrick, steel mast and boom with fittings and guy wires, but without hoisting cables; 1 derrick, cotton wood mast and boom with fittings and guy wires, but without hoisting cable, standing on north end of the wall; 1 drill press; 2 3-drum hoisting engines; 1 forge; 1 grindstone; 1 Jack screw; 1 Smith-Vaile pump, 2" discharge; 1 Smith-Vaile pump, 3" discharge; 1 pump, 1½" discharge; 13" steam pipe line 294 ft. long; 1 vise; 1 Crosscut saw; blacksmith blower and small tools; 1 cement shed; 1 blacksmith shop; 1 material house, and 1 two-story bunk house; 1 mess room; 1 kitchen and commissary; 1 office building and 3 bunk houses; 1 tramway, 20 lb. steel, 281 ft. of truck and 86 lineal ft. loose rail; 1 suspension bridge, 350 ft. span and 1 still for water; 1 set derrick fittings; 14,502 ft. round piles; 11,020 ft. sheet piling, ready to drive; 480 bolts, with washers, ¾x12; 10,480 ft. sheet piling 12x12, ready to drive; 1,100 lbs. nails; 50 cords of wood; 22 gauges for pier; 8 Capstan levers; 8 Friction roller arms; 8 journal boxes for dam; 52 cast journals, and 8 cast gate anchors.

"4. That the said personal property was, on the 30th day of June, 1910, of the fair market value of fifteen thousand dollars ($15,000.00).

"5. That on or about the 6th day of June, 1910, the defendant annulled its said contract with the Hubbard Building and Realty Company by reason of the failure of that Company to comply with its conditions.

"6. *That on or about the 30th day of June, 1910, the defendant, with full knowledge that the said personal property belonged to and was the property of the claimant, took in its sovereign capacity title to and possession of the said personal property of the claimant, and used said personal property in the construction of the said public work, to-wit, lock and dam No. 6, near Trinity River, Texas.*

"7. That the said defendant, since the said 30th day of June, 1910, has never returned the said personal property or any part thereof to the claimant, but still retains possession thereof, and has never paid claimant the value thereof, which it is in duty bound to do.

"8. That the defendant is justly indebted to the claimant for the said personal property so taken by it, as aforesaid, in the sum of fifteen thousand dollars ($15,000.00), exclusive of all set-offs and just grounds of defense, with interest thereon from the 30th day of June, 1910.

"The premises considered, the claimant demands judgment against the defendant in said sum of fifteen thousand dollars ($15,000.00), with interest from the said 30th day of June, 1910.

"BALL ENGINEERING COMPANY,
"By P. D. C. BALL,
"President.

"F. S. BRIGHT,
"Attorney for Claimant.
"LYON & SWARTZ,
"Of Counsel.

"STATE OF MISSOURI,

"CITY OF ST. LOUIS, *ss.*

"P. D. C. Ball, being first duly sworn, says that he is the President of the Ball Engineering Company and as such makes this affidavit in its behalf; that he has read the foregoing petition by him subscribed, and that the statements therein made are true to the best of his information and belief.

"P. D. C. BALL.

"Subscribed and sworn to before me this 27th day of May, 1916.

"My commission expires June 26, 1916.

"ANTHONY A. O'HALLORAN,

"Notary Public."

A true copy:

Test this September 26, 1917.

(Seal) F. C. KLEINSCHMIDT,

Assistant Clerk Court of Claims.

Office Supreme Court, U.
FILED
OCT 5 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917,

No. [redacted]227

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE & COMPANY, a Corporation,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

HOMER S. CUMMINGS,
Attorney for Petitioner,
Ball Engineering Company.

Supreme Court of the United States

OCTOBER TERM, 1917, No. 589.

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE & COMPANY,
a corporation,
Respondent.

Reply Brief on Behalf of Petitioner.

The petitioner in this reply brief does not seek to add to the argument set forth in the brief accompanying its petition, but desires only to correct some of the statements made in the brief filed by the respondent.

I.

The respondent's brief devotes seven pages to a discussion of the case of *United States* v. *Societe Anonyme Des Anciens Etablissements Cail,* 224 U. S., 309, in which a claim was allowed against the Government for royalties on a patented invention for use on large guns, on the theory that there was an implied contract between the claimant and the Government. We regret to have to point out that the respondent's brief gives an entirely misleading conception of the facts of that case by setting forth verbatim, at page 17, the

letter dated September 3, 1891, from Admiral Ramsay to the Secretary of State, without quoting the letters of the Chief of the Bureau of Ordnance and of the Secretary of the Navy in December, 1894, which superseded the earlier letter and constituted a reversal of the position of the Government with respect to the rights of the claimants, the *Societe Anonyme*. The stress which the respondent's brief places upon the letter of September 3, 1891, is inexplicable in view of the fact (not alluded to in respondent's brief) that this Court, in its opinion in the *Societe Anonyme* case, expressly stated, with reference to that letter:

> "*But the position taken in that letter was, as we have seen, abandoned*, and it was declared that so far as the De Bange patent was valid, its claim for royalties was, in the opinion of the Bureau of Ordnance, a proper one, and would be sustained by the courts. *This was in 1894.* Prior to that time and afterwards the government continued to use the device. We think the court of claims had jurisdiction." (Our italics.)
>
> *United States* v. *Societe Anonyme Des Anciens Etablissements Cail*, 224 U. S., 309, at p. 322.

In the case at bar the findings of the trial court disclose a situation differing so widely from that shown by the entire opinion of this Court in the *Societe Anonyme* case, that it seems sufficient to point out that in the case at bar it is undisputed that the Government deliberately and unequivocally took the position that it had the right to seize the petitioner's property without payment

or compensation to the petitioner. (See quotations and references to record at pp. 21-22 of petitioner's brief attached to petition for certiorari herein.) In the *Societe Anonyme* case, on the contrary, the facts were, as stated by this Court in its opinion:

> "The officers of the government knew of the De Bange invention and were aware of its great importance and the purpose to deliberately take property of *another* without the intention that *he* should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. *On the contrary, the record shows that compensation was contemplated.* There was doubt as to the extent of it, because there was doubt as to how far the devices used were attributable to or belonged to De Bange, or whether they constituted an infringement of his patent, and *therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it.*" (Our italics.)
>
> *United States* v. *Societe Anonyme, Etc., Cail*, 224 U. S., 309, at p. 320.

II.

The claim advanced in the respondent's brief, that the facts of the *Buffalo Pitts* case are analogous to those of the case at bar, is also without foundation. This Court in its opinion in the *Buffalo Pitts* case based its decision that the taking of the property in that case by the Gov-

ernment was upon an implied contract to pay the owner therefor, expressly upon the ground that the findings of fact of the trial court, which were conclusive upon this Court, established that the Government did not at the time of the taking dispute the plaintiff's right to compensation, but that, on the contrary, the Government officer agreed that if the property was left in the Government's possession he would recommend that payment be made to the plaintiff for its use, and that the plaintiff left the property with the Government, relying upon such representation and upon fact that its title was not disputed and with expectation that compensation would be paid. That this was the basis of the affirmance by this Court appears clearly from the following excerpts from its opinion in which it quoted verbatim findings X and XI of the trial court in that case:

> "The question in this case is, did these facts warrant the deduction that the government was liable upon an implied contract to pay for the use of the engine? In cases brought under this act coming up from a district or circuit court of the United States, the findings of fact of the trial court are conclusive, and the question is whether the conclusions of law were warranted by the facts found (citing cases).
>
> "We think the circuit court and the circuit court of appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to

> the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and, if left in its possession, payment would be recommended for such use.
>
> * * * * * * *
>
> "While the government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation."
>
> *United States* v. *Buffalo Pitts Co.*, 234 U. S., 228, at pp. 232-235.

This should be compared with the facts in the case at bar, which are that, contemporaneously with the taking of its property, the petitioner objected both to the Government and to the respondent against its use (Finding 16, Defendant's Exhibits 1 and 2, made part of Finding by reference, fols. 88-89; 286-290), and never in any way consented or waived its rights; that the Government ignored the petitioner's claim and took the position that it had the right to use the petitioner's property under the contract between the Government and the Hubbard Building & Realty Company (Findings 17, 18, 19, fols. 90-93), and that the Government further claimed to have the right to use petitioner's property without paying the petitioner and without *paying* the actual value to anyone, but merely upon crediting to the Hubbard Building & Realty Company the *value of the property as fixed by an officer of the Government at a*

figure now determined to be $3,500 less than its actual value, as an off-set against the indebtedness of the Hubbard Building & Realty Company to the Government. (Findings 26, 32, fols. 98-103.)

We submit that the opinion of this Court in the *Buffalo Pitts* case clearly indicates that it would have reversed the judgment in that case if the findings of the Court below in that case had established, as they do in the case at bar, that the owner of the property did not consent to the use of its property on a promise of compensation from the Government, but objected to its property being taken or used, and that the Government did not admit the owner's right to compensation, but denied it, and claimed a right to use the property without payment to the owner, by virtue of an alleged right claimed to exist under a contract between the Government and a third person.

III.

The respondent's brief evidently seeks to create the impression that the petitioner or its predecessor in title, Mr. Ball, had a financial interest in the Hubbard Building & Realty Company, the contractor, or that there was some identity or community of interest between the petitioner and the Hubbard Building & Realty Company which might create a situation under which, according to the respondent's theory, no injustice would be done if it were held that petitioner was bound by the terms of the Hubbard Building & Realty Company contract and could be deprived of property

without compensation. A large part of the respondent's brief is devoted to paraphrases from the findings and to argument which has no apparent purpose except in so far as it is intended to give rise to such an impression. In fact, the respondent's brief goes so far as to make a statement which is clearly intended to refer to the petitioner and Mr. Ball, to the effect that they were "interested in the contracting corporation, but not appearing of record as owners thereof" (Respondent's brief, p. 24; see also p. 25). At page 28 the brief states that "the reading of the record must convince any impartial mind that Ball was the controlling influence in the Hubbard Company."

The fact is that the respondent had an opportunity to litigate this entire subject thoroughly upon the trial, with the result that *not only did the Committee fail to make any finding that either Ball or the petitioner had the slightest interest in the Hubbard Building & Realty Company, but the Committee even refused to find that either the petitioner or Ball had knowledge of or was constructively or otherwise put upon notice of the provisions of the contract between the Hubbard Building & Realty Company and the Government.*

It is noteworthy that all of the Courts before whom this litigation has come are in harmony on the one proposition that the petitioner's rights to its property were not subject to the terms of the contract between the Government and the Hubbard Building & Realty Company (Report of Committee, fols. 104-107; see opinion of Circuit Court of Appeals annexed to petition and brief on this application for certiorari as Schedule A, at bottom of page 42; *J. G. White & Company* v. *Ball Engineering Company*, 139 C. C. A., 164, 223 Fed., 618).

On the other hand, the findings expressly hold that the respondent agreed with the Government that the risk of taking and using the petitioner's property was to be solely upon the respondent and that the respondent was notified by the petitioner before and at the time of the taking that the petitioner objected and would insist upon payment from the respondent for the taking of the property (Record, p. 101; Report of Committee, fol. 87, also pp. 30-31, 79-80, 96-97). It also appears that the respondent had negotiated with the petitioner for the purchase or rental of the property and had failed to reach an agreement (Report of Committee, fols. 88-89).

The motive forming the background for the entire episode is succinctly stated at pages 11-13 of the brief filed on behalf of the United States on the present motion.

As has been held by every Court in this case, there is not the slightest reason weighing against the right of the petitioner herein to recover the value of its property from respondent, unless it be held as a legal proposition that the Government took the property in its sovereign capacity and thereby acquired title.

IV.

The respondent has annexed to its brief, as an exhibit, what purports to be a copy of a petition filed by the petitioner in the Court of Claims on May 27, 1916, alleging a claim against the Government for the value of the property seized on the theory that it was taken by the Government

in its sovereign capacity. The date of that claim is a year after the decision of the Circuit Court of Appeal reversing the first judgment and several months subsequent to the date of the second report of the committee, which is dated April 26, 1916 (fols. 108). It is apparent that the claim was filed for the purpose of protecting the claimant against the running of the six-year statute of limitations, in the event that it should be finally held in the present suit that the taking by the Government was as sovereign. In view of the opinion which was rendered herein by the Circuit Court of Appeals in April, 1915 (copy of which opinion is annexed to the petition and brief for certiorari as Schedule A, pp. 40-44), expressly holding that the property was taken by the Government as sovereign, it was highly proper for counsel for the petitioner to file such a claim as a precautionary measure. Nor did the filing of such a claim preclude the petitioner from continuing to maintain the position which it has insisted on throughout the present litigation that the taking was not under the right of eminent domain but was a tortious taking for which the respondent was liable as a tort feasor. The claim filed in the Court of Claims has not been and will not be prosecuted until the final determination of the present litigation and then only in the event that it is held in the present suit that the Government took as sovereign.

There is no rule which required the petitioner to make an election at that time at its own peril as to the legal character and effect of the act of the Government in seizing its property.

The cases cited at page 10 of the respondent's brief are not in point. The principle involved in those cases is stated in one of them as follows:

> "Where a party *gives a reason* for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." Our italics.
>
> *Railway Company* v. *McCarthy*, 96 U. S., 258, at pp. 267-268.

The case of *Smith* v. *Boston Elevated Railway Co.*, 184 Fed., 387, held that the plaintiff in a negligence case,

> "after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false."

The other cases are similarly without application. None of them lay down any rule which would prevent a party, situated as is the petitioner in the case at bar, from taking such a precautionary measure as the filing of the claim in the Court of Claims.

V.

The respondent's brief in suggesting that the Government is in no position to attempt to deny the rightfulness of the respondent's possession, since the respondent obtained possession from the Government as lessee, wholely overlooks the provisions of Insert E contained in the contract between the United States and the respondent, which expressly provided that the United States did not undertake to transfer title, did not guarantee peaceable possession, would not defend any action, and that nothing done with respect to the seizure of the petitioner's property should be made the basis of a claim against the United States (Record, p. 101; Report of Committee, fol. 87, also pp. 79-80). Under the terms of that agreement the respondent took all the risks of the situation, and as between the Government and the respondent it was clearly agreed that if it became necessary to pay the petitioner for the property, such payment was to be borne by the respondent.

VI.

The statement contained in respondent's brief, at page 8, that the case of *Tinker & Scott* v. *United States Fidelity & Guaranty Co.*, 169 Fed., 211, is in accord with the *Buffalo Pitts* case, is doubtless inadvertent. In the Tinker case the plaintiffs were the owners of certain property which was upon the site of Government work. The original contract was annuled and the surety of the original contractor completed the

contract. The Government seized certain of the plaintiffs' property and turned it over to the Surety Company to use in the completion of the work, in substantially the same way as was done in the case at bar. The plaintiff sued the Surety Company in trover as did the petitioner in the present case. The plaintiffs had entered into a written agreement, with the original contractor, by which plaintiffs stipulated that they would be bound by the terms of the original contract. It was held that under the terms of the contract to which they had expressly assented some of their property was rightfully taken by the Government as a matter of contractual right. *The remainder of the plaintiff's property, however,* was held not to be within the terms of the original contract, and as to such remaining property *the Court granted a recovery in conversion to the plaintiffs* against the Surety Company, holding that the Government had been without right under the contract to seize such property and that the possession of the Surety Company, the defendant, was wrongful. The Court said:

> "The government was without authority, under its contract with Prendergast & Clarkson (the original contractors) to take the rock into possession or to deliver the same over to the defendant. Therefore the defendant's possession thereof is wrongful as against the plaintiffs, and the latter are entitled to recover its value."
>
> *Tinker & Scott* v. *United States Fidelity & Guaranty Co.,* 169 Fed., 211, at p. 216.

The case is therefore a direct authority in favor of the petitioner in the present case.

Point IV of the respondent's brief shows the importance of the questions involved in the case at bar, both from the standpoint of the Government and from that of contractors and owners of property brought upon the site of Government work. The present state of the law is one of confusion which can only be cleared away by a decision of this Court. The case is therefore clearly one in which a writ of certiorari should issue.

VII.

The Government acted solely in pursuance of what it claimed to be its contractual rights under its contract with the Hubbard Building & Realty Company, to which the petitioner was not a party and by the terms of which it was not bound, as has been established by the courts below. The Government officers proceeded upon the theory that the Government could acquire title to the property in disregard of the petitioner's rights and without payment or compensation to petitioner. Such procedure and the theory on which it was based have been held to have been erroneous. This being so, then, as the Government clearly negatived by its acts and words any intention of taking the property in its sovereign capacity under the right of eminent domain, the acts of its officers were clearly tortious and the Government acquired no title. There should

therefore be a recovery for the petitioner as in the *Tinker & Scott* case, *supra*.

It is respectfully submitted that the petition should be granted and a writ of certiorari allowed.

Respectfully submitted,

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Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 227.

BALL ENGINEERING COMPANY, PETITIONER,

against

J. G. WHITE & CO., A CORPORATION, RESPONDENT.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

Believing that the decision of the Court of Appeals in the case at bar to the effect that the United States is liable under the Tucker Act when property of a third person is taken by one of its agents under the circumstances disclosed in this record is based upon erroneous principles leading to results detrimental to the interests

of the Government, the United States joined in the petition for a writ of certiorari in the above entitled cause and now submits as *amicus curiae* the following brief of argument on its liability to the Ball Engineering Company under the facts shown in this record.

As a preliminary to the brief we wish to point out that the respondent, J. G. White & Co., with the knowledge that the plant and materials did not belong to the Hubbard Company, and had never belonged to the Hubbard Company, and after negotiations with the Ball Engineering Company for the rental or purchase from that company of said plant and materials had failed to result in agreement on a price, procured possession of petitioner's property with the assistance of a Government officer (upon conditions specifically exempting the Government from liability), and having procured possession of the property of the Ball Engineering Company on the site of the work, the White Company used that property in the completion of the lock and dam. Such action on the part of the respondent obviously amounted to conversion of the property of the Ball Engineering Company unless the United States in some way obtained the right to the property of the Ball Engineering Company on the site and transferred said right to the White Company.

The Circuit Court of Appeals, as well as the lower court, rejected the theory on which the Government and the respondent actually proceeded in seizing the petitioner's property and therefore the only way in which the respondent can escape liability for conversion is on the theory that the Government *did* acquire title to the property of the Ball Engineering Company under the right of eminent domain.

POINT I.

Where the case is not founded on the Constitution of the United States or a law thereof, or a regulation of an Executive Department, no recovery can be had if the case be one sounding in tort.

(*a.*) In United States *v.* Buffalo Pitts Co., 193 Fed. 905, 908, 909, the Court of Appeals analyzed Justice Brown's decision in Dooley's case, 182 U. S. 222, and his concurring opinion in United States *v.* Lynah, 188 U. S. 445, 474, and reached the following conclusion:

> "Accordingly we think the judgment below right, whether it rested on an implied contract of the Government to pay within the opinion of Mr. Justice Brewer in the Dooley Case or upon its constitutional obligation within the opinion of Mr. Justice Brown."

In its first decision of the case at bar, the Circuit Court of Appeals (223 Fed. 618, 620), said:

> "It (the Government) made no proprietary claim and therefore was bound to pay the real owner for the property, whether the taking was tortious or not."

(*b.*) It may be assumed that this statement of the law is correct, although it has never been adopted by this Court, but we deem it necessary as briefly as possible to consider the authorities.

(*c.*) It is true that in the Dooley Case, Justice Brown expressed the view that the limitation "cases not sounding in tort" in the Tucker Act applies only to actions for damages, so that a plaintiff can, as regards the United States, waive a tort and sue on the common counts; but

the remark was a mere dictum, for he concludes his opinion by holding (182 U. S. 228) that whether the importer could waive the tort and sue on an implied contract was immaterial as the case was one **founded on a law of Congress.** This is brought out by the most recent decision of this Court in this class of cases—United States *v.* Emery, 237 U. S. 28, 32—where the Court said:

> "However gradually the result may have been approached in earlier cases, it now has become accepted law that claims like the present are 'founded upon the revenue law.'"

It is further shown by the case of Russell *v.* United States, 182 U. S. 516, 530, 535 (a decision in the same volume as the Dooley Case, and in which Justice Brown joined), where the Court said:

> "This Court has held that under the Act of March 3, 1887, 24 Stat. 505, c. 539, defining claims of which the Court of Claims had jurisdiction, the Court had no jurisdiction of demands **against the United States** founded on torts. Schillinger *v.* United States, 155 U. S. 163; United States *v.* Berdan Fire-Arms Co., 156 U. S. 552. In other words, to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—'a coming together of minds.'"

And again in conclusion (p. 535):

> "This doctrine may be technical. If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued

in an action sounding in tort, this Court has declared, as we have seen."

As to the Lynah case, it is true that Justice Brown repeated the remarks made by him in the Dooley Case (188 U. S. 475), but this repetition was likewise a dictum, for he held that the case, being one of a taking as a sovereign of private property for public uses, was founded on the Constitution of the United States, so that no implied contract was necessary. Even so limited, the majority of the Court did not agree with him, but placed the decision on the ground of an implied contract, and in Peabody *v.* United States, 231 U. S. 530 (which was either a case of taking under the power of eminent domain, or nothing), the Court said (231 U. S. 539):

> "The suit must rest upon contract, as the Government has not consented to be sued for torts, **even though committed by its officers in the discharge of their official duties * * *; and a contract to pay cannot be implied unless there has been an actual appropriation of property."**

(Citing among other cases Russell *v.* United States, *supra*). In the Peabody case the officers acted under authority of an Act of Congress.

However, we have no disposition to question the correctness of Justice Brown's views. We only desire to call the Court's attention to their limitations, and to the firm attitude of this Court from the beginning up to the present day on the position that no implied contract can be set up against the United States in a case sounding in tort.

(*d.*) The Russell case, *supra,* was followed in Harley's Case, 198 U. S. 229, where the Court excluded from the jurisdiction "those contracts **or obligations** that the law is said to imply from a tort" (198 U. S. 234). In Juragua Iron Co. *v.* United States, 212 U. S. 297, 309, Russell's and Harley's Cases are relied on where there was clearly a taking for public use. It was held that, even if the laws of war did not justify the taking, it was a mere tort and hence "a claim against the Government for **compensation** on account thereof would make a case "sounding in tort." (The action was one to recover the value of the property taken, without damages.) In Crozier *v.* Krupp, 224 U. S. 290, 303, 304, Russell's and Harley's Cases are again affirmed, and the rule is stated that in case of infringement of a patent,

> "* * * the power to sue the United Sattes for redress did not obtain unless from the proof it was established that a contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers."

It was held that the United States by statute had now authorized the appropriation of such property as sovereign, and payment therefor. In United States *v.* Buffalo Pitts Co., 234 U. S. 228, 232, the Court again stated that there could be no recovery for acts merely tortious, repeated the distinction taken in the Lynah Case between the assertion of a proprietary and of a sovereign right, and placed its decision on the Act of Congress, and the Government's use of the claimant's property without disputing his title and without denying his right to compensation. In New Orleans-Belize S. S. Co. *v.* United States, 239 U. S. 202, 206, 207, the Court reaffirmed the

position taken in its prior decisions. Finally, in the case of Tempel *v.* United States, decided by this Court on December 9th, last, the whole matter was thoroughly considered again, and the various authorities analyzed. The conclusion of the Court was as follows:

> "The findings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice) show that the Government claimed at the time of the alleged taking and now claims that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the Government is well-founded. The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the Court from assuming jurisdiction of the controversy. *The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. Hill v. United States*, 149 U. S. 593, which both in its pleadings and its facts bears a strong resemblance to the case at bar, is conclusive on this point. See also *Schillinger v. United States*, 155 U. S. 163. The case at bar is entirely unlike both the *Lynah* case and the *Cress* case. In neither of those cases does it appear that, at the time of taking, there was any claim by the Government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the Government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And

when the implied promise to pay has once arisen, a later denial by the Government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the Government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 40-41." (Italics ours.)

It therefore appears clearly and emphatically, from a long line of decisions of this Court, that unless the case is founded on the Constitution or on some law of the United States, no recovery can be had in a case sounding in tort.

POINT II.

The claim of the Ball Engineering Company against the United States, if any, does not arise under the Constitution, and, therefore, necessarily is a case sounding in tort.

(*a.*) There is no claim made that the case is founded on any law of the United States or any regulation of an Executive Department. It must, therefore, either be founded on the Constitution, or be on an implied contract or for damages. If, however, the United States did not

rightfully take possession of the property under the Constitution, it must have acted under the provisions of the contract with the Hubbard Company. Since, however, the Circuit Court of Appeals has decided that it had no such right under the Hubbard contract, its action or that of its officers must have been tortious, and the claim of the Ball Engineering Company against it, if any, must have been one sounding in tort, and not one on an implied contract.

(*b.*) The question is, therefore, whether the claim arose under the Constitution; that is, since the Fifth Amendment is the only provision of the Constitution claimed to be applicable, whether the United States took the property of the Ball Engineering Company for public use under the power of eminent domain.

We are not aware of any power in the officers of the United States to take property for public use in times of peace without the authority of an Act of Congress or of a regulation having the force of law (a condition which existed in the Buffalo Pitts Case, but does not exist here). Waiving this point, however, the Lynah Case, *supra*, has clearly stated the conditions under which the United States will or will not be held to have taken property under the Fifth Amendment, the statement was affirmed in the Buffalo Pitts Case, and is now placed beyond doubt by the decision in Tempel's Case, *supra*. Where the United States, not denying the title of the claimant, asserts its right to take his property by virtue of a paramount governmental right, it proceeds under the power of eminent domain. Where, however, it is not asserting a governmental right, but claims that its right to the possession or ownership of property is superior to that of the claimant by virtue of the ordinary

rules of private law, there it is not asserting its overriding right of sovereignty, and if its title be defective under the law it has invoked, its action is merely tortious and *damnum absque injuria*. Moreover, whether the United States was, in any particular case, asserting its sovereign right depends upon its intent as gathered from all the facts. As said in the Peabody Case, *supra* (231 U. S. 538, 539):

> "But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; **that is, whether enough is shown to establish an intention on the part of the Government to impose it.**"

(*c*.) Applying these principles to the case at bar, the findings seem to be inconsistent with any other view than that the Government intended merely to assert a proprietary right arising out of the rules of private law, and had no notion of asserting a sovereign title, paramount to the admitted right of the claimant. This clearly appears, as it seems to us, from a comparison of finding 6 (Rec. 36)—made to conform to the decision of the Circuit Court of Appeals upon the first appeal—with the prior findings. There seems to be a complete *non sequitur*—a material gap which has not been bridged. All of the other findings are emphatic to the effect that the United States took possession of the property under the provisions of paragraph 33 of the Hubbard specifications and not otherwise. The answer of the White Company so alleged (Rec. 15), and all the evidence without any exception was to the same effect. The White Company requested the United States to proceed under this paragraph (Rec. 64), the United States had bound itself to do so at the White Company's request (Rec. 79), the Ball

Engineering Company was notified that the United States claimed the right under paragraph 33, and that it did not recognize any title in the Ball Engineering Company (Rec. 94, 95), the Hubbard Company was directly notified to the same effect (Rec. 101), and the Ball Engineering Company was warned that the United States, having taken physical possession under the terms of the Hubbard contract, would treat any attempt to remove the property as a trespass (Rec. 107). Nothing can be more certain, therefore, than that the United States intended to take possession, and did in fact take possession, under a claim of superior right arising out of the provisions of paragraph 33 of the Hubbard specifications. Apparently the Circuit Court of Appeals took the same view at the first hearing, for it said (223 Fed. 620):

> "It" (the United States) "professed to act under Section 33 of the contract with the Hubbard Company."

That Court surely cannot have meant to say that the United States was merely using paragraph 33 as a cloak while in reality intending to assert and in fact asserting its sovereign power of eminent domain; and just as surely that Court cannot have meant to hold that because the United States was wrong as to the validity of the right under which it acted, it must be taken to have acted under its sovereign right of eminent domain, whether it intended to or not, for such a holding would be directly contrary to the law as repeatedly laid down by this Court.

(*e.*) The decision of the Circuit Court of Appeals seems to rest upon the statement that, although the United States intended to act and did act under paragraph 33 of the Hubbard specifications, yet it did not

thereby make any proprietary claim. With great respect for the opinion of that Court, we are unable to understand what a "proprietary claim" would be, if this was not one. The claim of the United States fell and was intended to fall under the following formula: If A make a contract with X by which X agrees to erect a building for A, and the contract contain a provision that, on X's default with annulment of the contract, A shall have the right to take possession of all materials, etc., prepared for use or in use in the prosecution of the work and M, a subcontractor under X, bring materials, etc., on the *situs*, using them in the prosecution of the work, then A on annulment has the right to take possession of M's materials, etc., M for this purpose being merely X's agent (Rec. 95). Can there be any doubt that this was the consistent position of the United States? But this formula is one of private law and is applicable to private persons as much as to the United States. No claim was made that any statute gave the United States special rights, and the right of eminent domain was never even hinted at. All that it was intended to assert, and all that was in fact asserted was that under the general law of contracts and of agency the United States—like any private person in its situation—had a right to the possession of the materials. Such a claim is necessarily one of proprietary right—of a superior right of ownership or of possession under the rules of private law. Hence the possession, if not justified by those rules, was tortious, and no contract for compensation can be implied against the United States.

Respectfully submitted,

ALEX. C. KING,
Solicitor General.

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Supreme Court of the United States

BALL ENGINEERING COMPANY,
Petitioner,

vs.

J. G. WHITE & COMPANY, INC.,
Respondent.

OCT. TERM, 1918.

No. 227.

Brief on Behalf of Respondent.

This is an action brought in May, 1911, in the United States District Court for the District of Connecticut by the Ball Engineering Company, a Missouri corporation, against J. G. White & Company, Inc., a Connecticut corporation, for damages for the alleged conversion of a contractor's plant and equipment, consisting of bunk-houses, kitchen and commissary building, office building, material house, cement shed, dining-room and mess hall, two steam boilers, two derricks or pile drivers, three hoisting engines, two dump concrete buckets, one orange-peel bucket, twenty dump cars, one concrete mixer, three pumps, a lot of steam pipe and tramway rails, and including also some construction material consisting of round piles and sheet-piling, all of which equipment and material were prepared for use or in use in the prosecution of the work of constructing lock and dam No. 6, on the Trinity River, in the State of Texas, and all of which, including the buildings, were located upon the site of said lock and dam at the time of the alleged conversion.

Statement of the Case.

The finding of facts (designated in the Record as "Report of the Committee," and adopted by the District Court as its finding of facts) discloses the following:

P. D. C. Ball, who is the president and practically the sole stockholder of the petitioner, and George A. Carden were partners from about the year 1905, until April or May, 1909, the name of the firm being "Ball-Carden Company," and they were engaged, both as partners and also upon their individual accounts, in the contracting business in the State of Texas. This partnership purchased the contractor's equipment and materials involved in this suit, and during the twelve months prior to September, 1909, said partnership placed said equipment and materials on the site of said lock and dam, and built the said bunk-houses and other buildings for use in the performance of the government contract hereinafter mentioned, under which contract the said lock and dam No. 6 was, at that time, being built (Record, pp. 14 and 15; Findings Nos. 5 and 7).

On July 10th, 1906, the United States entered into a contract with the Hubbard Building & Realty Company, for the construction of said lock and dam No. 6 (Record, p. 14; Finding No. 4).

The said George A. Carden became the president of the Hubbard Building & Realty Company some time prior to December 7th, 1907, and continuously held said position until after September 8th, 1909, and on August 21st, 1908, the work upon said lock and dam No. 6, not having progressed as rapidly as required by the terms of the contract, he, as president of said corporation, applied for and obtained from the United States Engineer Officer in charge of said work, an extension of time for its completion until eight months from September 1st, 1908, and on May 29th, 1909, he, as president of said corporation, made a further request

for an additional extension of time which was also granted by said Engineer (Record, pp. 14, 15 and 16; Findings Nos. 6 and 12).

The said plant and equipment, buildings and materials, were used by the said P. D. C. Ball and George A. Carden, as partners in the construction of said lock and dam No. 6, until on or about the month of May, 1909, at which time said partnership was dissolved (Record, pp. 14 and 15; Findings Nos. 5 and 7).

Upon the dissolution of said partnership, the work of constructing said lock and dam No. 6, was assumed by the said P. D. C. Ball, who continued said work, operating under the name of "Ball Engineering Company," and using for that purpose the said equipment, machinery, buildings and materials, until on or about September 8th, 1909, when he discontinued said work, left all of said property upon the Government Reservation at the site of the said lock and dam, and did not thereafter resume the work of constructing said lock and dam (Record, pp. 15 and 61; Finding No. 8, and Defendant's Exhibit 23).*

On or about July 24th, 1909, the said George A. Carden executed and delivered to the said P. D. C. Ball a bill of sale, whereby for the consideration of one dollar and for other good and valuable consideration, the said George A. Carden sold to the said P. D. C. Ball all of the right, title and interest of the said George A. Carden, in and to all of the personal property of every kind and description, belonging to the partnership of Ball-Carden Company, "used in connection with or located at or near lock and dam No. 6," which included the property involved in this case (Record, pp. 15 and 23; Finding No. 7, and Plaintiff's Exhibit "A".)

On dates beginning January 4th, 1909, and ending September 8th, 1909, ten checks were issued and signed by A.

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*Reference to Exhibits are limited to such as are incorporated by reference thereto in the Findings.

E. Waldron, Captain, Corps Engineer, U. S. A., all payable to the order of the nominal contractor, the said Hubbard Building & Realty Company, in payment of the monthly estimates or vouchers issued by said Engineer for work performed under the contract for constructing said lock and dam No. 6, by Ball-Carden Company or by P. D. C. Ball, and all of said checks are endorsed as follows: "Hubbard Building & Realty Company, by George A. Carden, President," and under said endorsement appears the endorsement, "P. D. C. Ball." Each of said checks bears on its face a statement showing that it had been issued in payment for work done upon the construction of said lock and dam No. 6, and the proceeds of all of said checks were received by the said P. D. C. Ball (Record, p. 16; Finding No. 12).

While the said lock and dam No. 6 on the Trinity River was being constructed by the said P. D. C. Ball and George A. Carden as partners and later by P. D. C. Ball upon his own account, he, the said P. D. C. Ball, also was constructing on his own account locks and dams Nos. 2 and 4, being a portion of the same general project for the improvement of the navigation of said river (Record, pp. 16 and 17; Finding No. 13).

A certain Oscar Shanks was the general superintendent of the said P. D. C. Ball, upon the work of constructing the said locks and dams Nos. 2 and 4; and from June 1st, 1909, which was after the said P. D. C. Ball had taken over the work of constructing the said lock and dam No. 6, upon the dissolution of the aforesaid partnership, existing between himself and the said George A. Carden, Mr. Shanks became his general supjerintendent in charge of the work of constructing said lock and dam No. 6, and continued to act in such capacity until the said P. D. C. Ball abandoned the work of constructing said last-mentioned dam, which was on September 8th, 1909 (Record, pp. 15, 16 and 17; Findings Nos. 9 and 13).

The said Oscar Shanks was familiar with the terms of the contract and specifications under which the work of constructing said lock and dam No. 6 was being performed by the said P. D. C. Ball, and had the contract and specifications in his possession, they having been turned over to him by his predecessor, and he, from time to time, discussed them with Captain A. E. Waldron, the Government engineer officer in charge of the work, and said Shanks carried on said work under the direction of the said P. D. C. Ball (Record, pp. 15 and 16; Finding No. 10).

The said P. D. C. Ball quit work upon said lock and dam No. 6 on the day when he received the last one of the monthly checks covering payment for work done thereon, and which, as has been stated, were made payable to the nominal contractor, but endorsed over to him by his partner, the said George A. Cardon, who was also the president of the nominal contractor. The last of these checks bears date the 8th day of pp. 15 and 16; Findings 9 and 12).

It does not appear from the findings under what circumstances the partnership of Ball-Carden Company and later the said P. D. C. Ball, operating under the name of "Ball Engineering Company," undertook the performance of the contract between the Government and the Hubbard Building & Realty Company, but it does appear, and is not denied, that they purchased and placed upon the Government Reservation at the site of the said lock and dam No. 6 all of the property involved in this case, and employed and used it in doing the work which the Hubbard Building & Realty Company was nominally bound by the contract to perform, and that beginning with January 4th, 1909, the said P. D. C. Ball received all of the payments made by the Government on account of work done upon said lock and dam, all of said work having been performed by the partnership until its dissolution in April or May, 1909, and by the said P. D. C.

Ball thereafter until he abandoned it on September 8th, 1909 (Record, pp. 15, 16 and 17; Findings 8, 9, 12 and 14).

The work having been abandoned by the said P. D. C. Ball, as aforesaid, the Engineer Officer in charge for the Government, on October 22nd, 1909, gave notice, pursuant to the provisions of the contract, of its annulment (Record, pp. 16 and 35; Finding 11, and Defendant's Exhibit No. 17).

All of the property involved in this case remained on the Government Reservation at the site of said lock and dam No. 6 after the said P. D. C. Ball had abandoned the work, and on March 16, 1910, he addressed to the Engineer Officer in charge for the Government a letter in which he claimed that the boilers, engines, pile drivers, cars, tracks, cement, lumber, piles and iron were his personal property and that as they could be used to advantage by him in his work upon locks and dams Nos. 2 and 4 he requested information as to the theory on which the Government "refuses to turn over this property to him." The buildings and other property involved in the case he at no time, prior to the institution of this suit, made any claim for. He repeated his aforesaid claim and demand in another letter dated April 16th, 1909 (Record, pp. 17, 54 and 55; finding 16, and Defendant's Exhibits 5 and 6).

These letters of the said P. D. C. Ball were submitted by the Engineer Officer in charge of the work to the Chief of Engineers of the U. S. Army, who directed the Engineer Officer in charge of the work to notify the claimant of the property, and other persons interested

> "that the Department is proceeding on the assumption that the title to the property is in the Hubbard Building & Realty Company, the contractor for the construction of lock 6 and that the United States has the right, under paragraph 33 of the specifications forming part of the contract, to take possession of all or any part thereof; * * * that it is not yet certain whether or not the United States will elect to exercise this right; * * * that the United States does not recognize Mr. Ball in

this matter *except as the representative or agent of the contractor, the Hubbard Building & Realty Company;* * * * and that if efforts are made, through action in the courts, or otherwise, to remove the property, this office should be promptly advised, in order that the Department of Justice may be requested to instruct the United States District Attorney to take charge of the defense." (Italics are ours.)

A copy of the instructions of the Chief of Engineers, U. S. A., to the Engineer Officer in charge of the work was delivered by him to Mr. Ball on April 28th, 1910 (Record, 66. 17, 55 and 56; Finding No. 16, and Defendant's Exhibit No. 18).

Pursuant to advertisement dated April 30th, 1910, a contract for the completion of the work of constructing said lock and dam No. 6 was awarded by the Government to the J. G. White Company, Inc., the respondent. This contract bears date May 18th, 1910, and was approved by the Chief of Engineers, U. S. A., on June 6th, 1910 (Record, pp. 17 and 37; Finding 15, and Defendant's Exhibit No. 21).

On June 6th, 1910, a question having been raised by the said P. D. C. Ball as to the right of the respondent to use the contractor's equipment and materials left by him upon the Reservation, the Engineer Officer in charge of the work notified the respondent by letter that

> *"the fact that the material and machinery is on the Government Reservation* or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the lock site, *is sufficient to assume that the Government has taken possession of the items you speak of at the present time. They are therefore turned over to you under the conditions contained in Insert E, following paragraph* 38 *of the specifications for the construction of lock and dam No. 6, Trinity River, Texas, for use in further work on lock and dam No. 6, Trinity River, Texas."* (Italics are ours.) (Record, p. 18; Finding No. 18.)

On the same day; that is, on June 6th, 1910, the Engineer Officer in charge of the work notified both the "Ball Engineering Company", that is, Mr. Ball (for he had not yet caused his business to be incorporated), and Mr. Carden, president of the Hubbard Building & Realty Company, of his action in taking possession of the buildings, plant, equipment and material "formerly used in the prosecution of your contract (now annulled) for the construction of said lock and dam No. 6". His letter giving said notice contains the following statement:

> "The detailed list of plant, equipment, material and buildings required is as follows."

Then follows a list of the property taken over by the Government, and a statement that such property had been taken possession of under the provisions of paragraph 33 of the original specifications, and the concluding paragraph of the letter calls upon the original contractor to remove

> "such other property and materials as you have at lock and dam No. 6, Trinity River, Texas, not listed above * * * or give notice of its abandonment within the next thirty days." (Record, pp. 17, 58, 59, 60 and 61; Finding No. 17 and Defendant's Exhibit No. 22.)

Mr. Ball replied to the above notice of June 6th, 1910, on June 8th, 1910, stating that the property belonged to him personally, and on June 9th, 1910, a letter was written to him by the assistant to Captain Waldron, Corps of Engineers, U. S. A. (who was the Engineer Officer in charge of the work), stating that notwithstanding the assertion by Mr. Ball that the property in question belonged to him personally, any attempt to remove any of the property that had been listed in Captain Waldron's notice of June 6, 1910,

> *"will be considered as a trespass, as the Government has actually taken physical possession of the property under the terms of the annulled contract."* (Record, pp. 17, 62, 63 and 64; Finding No. 17, and Defendant's Exhibit No. 24.)

On June 22, 1910, the Engineer Officer in charge of the work notified the J. G. White & Company, Inc., the respondent, that he had determined that $380 per month was a fair rental to be paid by said respondent to the Government for the buildings and machinery that had been taken possession of by the Government and that such rental should be paid to the Government therefor and that he had also fixed valuations upon the materials at the lock site and that the respondent could take such of them as it deemed proper at such valuations, respectively (Record, p. 18; Finding 19).

On July 18th, 1910, the respondent receipted to the United States for the buildings and machinery and for such of the materials as it was willing to and did receive. In forwarding the receipt forms to the respondent for its signature, Captain Waldron said in his letter of June 22, 1910:

> "Referring to the property recently seized by the Government at lock and dam No. 6, Trinity River, Texas, and turned over to you, I enclose herewith memorandum invoice for same * * * If you wish to make any change as to the number of articles you receive (as for instance in the round piles and the sheet piling), please take the matter up in detail with Mr. Erhardt." (Record, pp. 18 and 64; Finding Nos. 21, 22, and Defendant's Exhibit No. 25.)

On August 5, 1910, the Engineer Officer in charge of the work notified P. D. C. Ball and the Hubbard Building & Realty Company that the respondent had taken certain of the materials seized by the Government; that the total valuation, assessed by him, upon the materials taken by it and incorporated in the work was $2,640.96; and the said P. D. C. Ball and Hubbard Building & Realty Company were further notified by him to remove the balance of the materials within thirty days (Record, p. 18; Finding No. 22).

The respondent completed the work of constructing the said lock and dam No. 6; paid to the Government the rental

of the buildings, plant, equipment and machinery as determined by the Engineer Officer in charge of the work, which was at the rate of $380 per month for the months of July, August, September, October and until November 15, 1910, and thereafter, at the rate of $310 per month until the work was finished and accepted by the Government during January, 1911. The occasion for the reduction of the rental was the surrender by the respondent, on November 15, 1910, of two of the hoisting engines, three of the pumps and one of the dump-buckets, to the Government. In addition to the rentals paid to the Government by the respondent for the use of the buildings, etc., it paid the Government the sum of $2,640.96 for the materials turned over to it and incorporated in the work (Record, pp. 18, 19 and 67; Finding No. 24, and Plaintiff's Exhibit D).

On or before the completion of the lock and dam the respondent returned to the Government all of the property involved in this case, other than the materials which had been turned over to it by the Government to be incorporated in the work and which were so incorporated, and for which materials it paid to the Government the sum of $2,640.96, as aforesaid, and all of said property other than said materials incorporated in the work were tendered by the Government to the said Hubbard Building & Realty Company and to said Ball, neither of whom accepted said property (Record, p. 19; Finding No. 25).

After the return of said property by the respondent to the Government the said property remained at the site of the said lock and dam No. 6 in the possession of the Government (Record, p. 20; Finding No. 31).

On January 30, 1911, which was after the said lock and dam No. 6 had been completed and accepted, the said Engineer Officer in charge of the work notified the said George A. Carden, president of the Hubbard Building & Realty Company, that he could take and remove said property from

the lock site provided he did so by February 28, 1911, and that his failure to remove it would be taken as indication of his intention to abandon same, but this notice was withdrawn on February 3, 1911, upon a telegraphic order to said Engineer Officer from General Bixby, Chief of Engineers, U. S. A. (Record, pp. 19, 68, 69, 70; Findings Nos. 27, 28, 29; Plaintiff's Exhibit E, and Defendant's Exhibits 30 and 32).

On the same day, that is, February 3, 1911, the said Engineer Officer in charge of the work ordered the United States Inspector under him to allow no claimant of the said property to take possession of any part of it (Record, pp. 19 and 20; Finding No. 30).

On or about April 2, 1910, the petitioner, the Ball Engineering Company, was incorporated under the laws of the State of Missouri with a capital stock of $50,000.00, divided into five hundred shares, four hundred and ninety-eight of which were issued to and are held by the said P. D. C. Ball, the consideration for the issuance of said stock being the sale and delivery by the said P. D. C. Ball to his said corporation of a large quantity of contractor's plant, equipment and machinery located at various places in the State of Texas, of which the property in controversy in this case constitutes but a small portion. Ever since the incorporation of the petitioner, the Ball Engineering Company, the said P. D. C. Ball has been its president, one of its directors and the holder and owner of four hundred and ninety-eight out of the total issue of five hundred shares of its capital stock (Record, p. 14; Finding No. 3).

ARGUMENT.

I.

The Taking of the Property of the Petitioner's Assignor by the Officers of the United States was a Valid Exercise of the Sovereign Power of Eminent Domain Possessed by the Government, Subject to Which All Private Property is Held.

The improvement of the navigation of the Trinity River was authorized by Act of Congress, approved March 3rd, 1905, (33 Stat. 1131) and by subsequent Acts appropriating funds for the purpose of acquiring the necessary property and providing for the cost of the necessary structures.

It has been held in connection with similar improvements authorized by the same Appropriation Act of March 3rd, 1905, and by other similar Acts, that the authority of the Government to take private property needed by it in making such improvements is not confined to such Acts, but that the Act of April 24, 1888, Ch. 194, 25 Stat. 94 (U. S. Comp. St. 1901, p. 3325), confers upon the Government the right to take

> "any land, right of way, *or material* needed to enable it to maintain, operate, or *prosecute* works for the improvement of rivers and harbors for which provision has been made by law."
>
> U. S. vs. Certain Lands in Narragansett, R. I., 145 Fed. 654, 657;
>
> Houck vs. U. S., 201 Fed. 867.

The recent decision by this Court of the case of U. S. vs. Buffalo-Pitts Company, 234 U. S. 228, is confidently relied upon for the reason that it is impossible to distinguish that case from the case at bar. In both cases the contract was

for the construction of public works authorized by Acts of Congress.

Reclamation Act, June 17, 1902, 32 Stat. 388;
Appropriation Act, March 3, 1905, 33 Stat. 1131.

The authority conferred upon the Secretary of War by Congress to exercise the Government's right of eminent domain in the work of improving the navigation of rivers and harbors, is conferred in practically the same language as that which is employed in the statute conferring upon the Secretary of the Interior similar power in connection with reclamation projects.

Act of April 24, 1888, Ch. 194, 25 Stat. 94;
Act of June 17, 1902, 32 Stat. 388.

In both cases the contracts were awarded to and stood in the names of parties other than the owners of the plant and equipment placed upon the sites and used in the performance of the work. In the Buffalo-Pitts case the engine in question was placed upon the site of the work shortly before the default and annulment of the contract, and in the case at hand, the buildings, plant, equipment and materials had been placed upon the site of Lock and Dam No. 6 more than a year before the default and annulment of the contract.

In the Buffalo-Pitts case the chattel mortgage under which said company claimed title to the engine was not filed for record until the engine had been actually delivered on the site of the work and actually used in the prosecution thereof. In the case at hand the buildings, plant, equipment and material had been upon the site of Lock and Dam No. 6 and actively used in construction for over a year before the annulment, and thereafter remained upon the Lock and Dam site in the possession of the Government for about six months

before the plaintiff corporation acquired title or ownership to said property.

In both cases the contracts contained provisions entitling the Government to take possession of and use the plant, equipment and materials used or prepared for use upon the work in the event of annulment of the contract.

In both cases the contracts were annulled by the Engineer Officer in charge thereof for want of due prosecution of the work on the part of the contractors.

In both cases the Engineer Officers in charge of the work, acting under instructions of the Chief of Engineers, United States Army, in the one case, and of the Reclamation Bureau in the other case, refused to permit the removal from the construction sites of the plant and equipment involved.

In both cases this action on the part of the Engineer Officers in charge of the respective works, was based upon the contract provisions, although the contracts had been entered into with persons other than the owners of such property.

See Finding No. 17, Record, p. 17, of the case at bar, to the effect that Captain Waldron notified the President of the Hubbard Building & Realty Company that the property in question had been "taken possession of under the provisions of Paragraph 33 of the Original Specifications which form a part of the contract," a copy of said notification having been also sent to the petitioner.

See Finding in the Buffalo-Pitts case, paragraph V, page 17, of Record, reading as follows:

> "That the said Construction Company having made default in the performance of its said contract on or about the 7th day of June, 1905, was suspended from work thereunder, * * * and the United States on that day took possession of all material, supplies and equipment belonging to said Construction Company, including the said engine and appurtenances, pursuant to and under the provisions of said contract with the United States."

And see letter from the Department of the Interior to the Buffalo-Pitts Company dated August 2nd, 1905, and appearing on pages 46-47, of the Record, in the Buffalo-Pitts case, reading in part, as follows:

> " * * * Under the terms of said contract in case of default by the contractor the United States is entitled to the possession of the contractor's machinery delivered on the ground, and if the engine referred to was delivered, the United States has taken possession of it under the terms of said contract.
>
> "The remedy of those furnishing labor or materials used by the contractors in the prosecution of contracts with the United States appears to be set forth in the Act of Congress approved February 24th, 1905 (33 Stat. 811)."

And see also letter from the Department of the Interior dated September 26th, 1905, addressed to the Buffalo-Pitts Co., appearing on pages 50-51 of the Record in the Buffalo-Pitts Company case, in which the Chief Engineer stated, among other things:

> " * * * Upon default of the contractors, the Government under the terms of the contract which was in force at the time the chattel mortgage is said to have been filed, took possession of all machinery, tools and appliances belonging to the contractor, upon the ground."

The communications from which the foregoing quotations are taken and to which reference is made, are the only communications that were received by the Buffalo-Pitts Company from the Government officials and there were no letters subsequent to the communication of September 26th, 1905:

And see the claim of the Buffalo-Pitts Company as stated on page 24 of their brief, filed in this Court:

> "They (*the Government employees*) claimed that the engine came under the contract, and therefore that they could hold and use it, but whether this was a Govern-

mental or proprietary right, the employees did not attempt to say or to inquire."

In both cases the representatives of the Government refused to recognize the claims of the owners of the property involved and denied all liability on the part of the Government to make compensation therefor.

See letter of Chief of Engineers, United States Army, of April 25th, 1910, copy of which was sent by Captain Waldron to Mr. Ball on April 28th, 1910, Defendant's Exhibit 18, Record, pp. 55 and 56, and Finding No. 16, in which the Chief of Engineers stated the Government's position to be as follows:

> "The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value."

See letter of the Department of the Interior to the Buffalo-Pitts Company, dated August 2nd, 1905, and quoted in full in the Record in the Buffalo-Pitts case, pp. 46 and 47, in which the Acting Director stated:

> "The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States appears to be set forth in the Act of Congress approved February 24th, 1905 (33 Stat. 811)."

See Record in Buffalo-Pitts case, page 55, where the Government officials in Washington in April, 1907, two years after the taking by the Government, advised the plaintiff's attorney that the Government had investigated the case fully and was not legally liable and rejected the plaintiff's claim.

In both cases the property involved was turned over by the Government to the contractors to whom were awarded

contracts for completing the respective works; was used by such contractors, and after the completion of the works was, in both cases, left upon the Government reservations.

It does not appear whether or not the contractors who succeeded the original contractor upon the Hondo project, which was the work involved in the Buffalo-Pitts case, was required by the Government to pay a rental for the engine that had been taken from the Buffalo-Pitts Company, but, as we have seen, in the case at bar the respondent was required by the Government to pay it a substantial sum as rental of the buildings, equipment and machinery, and the sum of $2,640.96 for the materials turned over to it, and which were incorporated in the work.

This Court, in its opinion in the Buffalo-Pitts case, affirming the decision of the Circuit Court of Appeals, said, on pages 232, 233 and 234:

> "It may be said, as contended, that under the contract with the Construction Company the Government had a right to take possession of this engine which was in possession of the company as mortgagor, and by virtue of the terms of the agreement, complete the work, but it could not in this manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances, we think the former decisions of this Court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for public use, require the Government to make compensation for the use of this engine, and that the facts bring this case within United States vs. Lynah, *supra*."

The case of U. S. vs. Société Anonyme des Anciens Etablissements, 224 U. S. 309, was an appeal from a judgment of the Court of Claims in favor of the petitioner. The suit was brought for the recovery of royalties or damages claimed to be due the petitioner on his contention that

the Government used a certain patented invention of the petitioner's assignee, Col. De Bange.

The principal question for determination, both in the Court of Claims and in this Court, was whether the acts of the Government officers, as shown by the correspondence and facts set forth in the findings were such as to constitute an implied contract, as distinguished from a tort, between the United States and the petitioner.

The following facts are taken from the findings in the record of that case:

The patented invention came to the attention of a gun foundry board of the United States, authorized by Act of Congress, and was directly brought to the attention of the United States Minister on June 26, 1891, in a letter from Colonel De Bange claiming compensation for the unauthorized use by the United States Government of his invention. In the same year he presented his claim in writing to the Secretary of State at Washington. This letter was the subject of official comment between departmental officials, who passed unfavorably upon his claim and who took the position that the gas check used by the United States Government was covered by patents which it itself owned, and that, therefore, there was no ground for a claim of infringement. On January 31, 1894, formal claim was again made to the War Department and Navy Department of the Government, demanding payment for the use of the invention.

On February 10, 1894, the Secretary of the Navy replied to the claimant, stating that the status of the case had not changed, since it had been determined in 1891 that the gas check adopted by the United States Government resembled in certain features the claimant's patented invention, but that it also differed from it materially in certain particulars which were original in the Navy Department. And the Secretary of the Navy closed his letter by saying:

> "and as the matter has been previously disposed of by the Department, no further consideration of the case appears to be required."

During all of this time the invention had been used by the United States under the claim that it was the property of the United States under certain patents owned by it. On December 31, 1894, the final communication was forwarded by the War Department to the petitioner in respect to his claim. It advised the petitioner that his claim, if pursued, would probably involve other similar patents in use, and contained the suggestion that recourse might be had to the Court of Claims by him if desired.

On January 31, 1895, the Societê filed its petition in the Court of Claims.

The Government in the Anciens Etablissements Case, in its brief filed in this Court, claimed the following assignment of error:

> "That the Court erred in failing and declining to hold that the facts disclosed by the correspondence between the parties hereto constituted an infringement or tortious use by the United States of the device alleged to be covered by the patent in suit; and that the Court erred in holding that it had jurisdiction of this cause, as of an implied contract in fact, arising out of the correspondence showing the relation of the parties hereto in connection with the claim in question."

The position of the Government before this Court was that there was never any meeting of the minds of the parties in the suit, and certainly not as to the recognition of any obligation by the Government, or as to any promise on the part of the authorized officers of the Government to compensate the claimant for such use. The cases of Russell vs. U. S., 182 U. S. 516, and Harley vs. U. S., 198 U. S. 229, were claimed to be directly in point and decisive in favor of the Government. The Government claimed that the Societê made no claim for compensation except as its letter of June 19, 1891, could be considered such a claim, and this letter, if showing any claim at all, was a claim not for an authorized or permitted use, but for "an unauthorized and surreptitious use";

or, in other words, "a tortious use," out of which no implied contract in fact to pay compensation could arise. The Government further contended that no board or authorized officer made any declaration that they were of the opinion that the claimant should be compensated. It was strongly urged that the Government used what it did under a claim of right derived from the Davis and Gerdom patents, for which it paid; and that it used the device before any demand or request for compensation, without any intent expressed to give compensation, and without any course of conduct from which an agreement to give compensation could be implied from the mere use.

The Government further argued that when the claim in question was presented to the Departments of this Government the officials were careful not to make any acknowledgment of the Societé's right to compensation; instead, their position as stated to the claimant was that "there appears to be no proper ground for the claim of Colonel De Bange"; that the Department had reached a decision that there was no ground for the claim in question; and that the claimant, having been notified of the Department's action, there was nothing on which to predicate an understanding that the Government would pay for the use of De Bange's invention. And finally the Government claimed that the suggestion in the letter of the Secretary as to recourse to the Court of Claims did not confer any rights upon the claimant any more than it did in the Russell Case, and did not bind the Government in any implied promise to compensate the claimant for the use of the invention in question.

This Court, however, after considering the cases of Russell vs. U. S., 182 U. S. 516, and Harley vs. U. S., 198 U. S. 229, held in the Anciens Etablissements Case that an implied contract had been raised to pay for the property, stating at page 320:

> "It is not possible to review the arguments by which the claimant asserts and the Government denies the

sufficiency of the facts as we have related them to constitute an implied contract between the claimant and the Government. The ultimate contention of the Government is that the mere use of the patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, but 'there must be (1) a use of it with the patentee's assent, and there must *also* be (2) an *agreement* or *meeting of minds* on the part of the patentee and on the part of the user *as to compensation for the use,* even though the amount of the compensation be not fixed. These elements, it is insisted, were present in the Berdan Case, which we have seen was relied on by the Court of Claims; they are, it is further insisted, absent in the case at bar.

"But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated. There was doubt as to the extent of it because there was doubt as to how far the devices used were attributable to or belonged to De Bange or whether they constituted an infringement of his patent, and therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it."

In short, the position of the United States in the Anciens Etablissements Case was: We deny that we are using your property and advise you that you have no claim; if you still think you have a valid claim against the Government, the Court of Claims is open to you.

In the case at hand the Government, never asserting any proprietary right in the property, gave credit to the con-

tractor for the property, thus showing much more clearly than in the two cases previously decided by this Court, and quoted herein, that it recognized a liability for the value of such property.

In the Anciens Etablissements Case this Court said there was doubt and hesitancy as to the extent of the liability for compensation. So, in the case at bar, there was doubt as to the person who was entitled to be paid, and as the Circuit Court of Appeals said, the Government recognized the wrong person as owner, but clearly showed its attitude of liability to whomever should prove to be the true owner, by crediting the value of the property in the Government account relating to this particular job. In the Anciens Etablissements Case, after the interchange of communications between the claimant and the Government had ceased, and years afterwards when the claimant had pursued his claim in the Court of Claims against the opposition of the United States, it was established that the property used by the Government *was* the claimant's; *i. e.*, covered by his patents rather than by those licensed by the Government. And in the case at hand it developed that the Government was at first uncertain as to its rights to deal with this property under the contract, and that at first it mistakenly interpreted its rights thereunder, but nevertheless continued to hold the property, making no proprietary claim thereto, but crediting its value to the nominal contractor in the account kept relative to this particular improvement.

The case of U. S. vs. Lynah, 188 U. S. 445, was an action against the United States for compensation for the taking of certain real estate in South Carolina. It appeared that in improving the navigation of the Savannah River the Government had built dams which raised the water in the river, backed it up against the embankments, and prevented the drainage of the plaintiff's plantation. There was no specific Act of Congress authorizing the appropriation of this specific

property. The case was tried on the theory that the Government could not be held responsible for what it had done. In holding that the claimants were entitled to compensation from the Government for the taking, this Court said at page 462:

> "The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'
>
> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

In United States vs. Great Falls Manufacturing Company, 112 U. S. 645, there was such informality in the Government's condemnation proceedings that the seizure of the property was without warrant of law, except that Congress had authorized the public improvement and made appropriation therefor. This Court held that there was an implied obligation on the part of the United States to make compensation to the owner:

> "The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant

might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl vs. United States,* 91 U. S. 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an Act of Congress, as private property to be applied for public uses.

"In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose." (Pages 656, 658.)

The same case was before this Court a second time in Great Falls Manufacturing Company vs. Garland, 124 U. S. 581, when it was again held:

"It was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the Act under which its officers have proceeded."

It was established in the last-mentioned case that the Engineer had taken more property for the public improvement than had been authorized by Congress to be taken, and it was contended by the Government that it could not be held responsible for such unauthorized act of its officer; that such act amounted to a tort on the part of the officer; and that, therefore, no implied contract to compensate the owner for the property so taken, could be predicated.

This Court disposed of this defense by observing:

> "It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the Act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property * * * taken, used, and held by him for the purposes indicated in the Act of Congress, whether it is embraced or described in said survey or map or not."

In all these cases, as well as in the case at bar, the Government took property or rights that were needed by it in the making of public improvements or in furtherance of public welfare, but to which it asserted no title vested in the Government prior to the taking. Thus the Government acted under its sovereign power of eminent domain, a power which is, however, subject to the limitation imposed by the Fifth Amendment of the Constitution:

> "Nor shall private property be taken for public use without just compensation."

In the case at bar the statute conferred the right of eminent domain upon the Secretary of War, and it was exercised directly and immediately by the taking and holding of the petitioner's property. The action of the Army Engineers was the exercise of a Governmental right. Only a sovereign power would assume such a right as was asserted by them. In order to complete a public work they commandeered the buildings that had been erected upon the Government reservation and the plant and equipment that had been assembled there by the only persons who ever did any work towards the performance of the Hubbard Building & Realty Company contract, namely, Messrs. Ball and Carden, but they did not take this action until after Mr. Ball had deliberately abandoned the work. The Government Engineers made no claim that the property in question had be-

come the Government's property. They asserted that under the terms of the contract the Government had the right to retain and use it in the completion of the work and also to purchase it at a price to be determined by the Engineer Officer in charge, but the purchase was a mere incident, the important fact being the retention for use in completing the work, of the property involved. This point is emphasized by the dissenting opinion of Judge Noyes of the Circuit Court of Appeals, in the Buffalo-Pitts case. The learned Judge assumed that the Government's employes claimed a proprietary right in the engine, but in this he went beyond the evidence as the claim of the Government's employes was that the engine came under the contract and that, therefore, they could hold and use it, but whether this was a Governmental or proprietary right, the employes did not attempt to say or to inquire.

As was said by this Court in the Lynah Case, *supra*:

> "Very different from this proprietary right of the Government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal and real property whenever its necessities, or the exigencies of the occasion demand. So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation."

The petitioner in its brief (page 19) concedes that the Government made no claim to the ownership of the property in question, but continuing its argument emphasizes its claim that the Government made no immediate payment for the property, and only gave credit at a considerably later date

for the alleged value thereof, and gave that credit to the contractor. The petitioner did, indeed, some months after the taking, propose to the Government in its letter of June 8, 1910, that the Government must pay for all of this property before "taking any manner of possession of any of the property" (Record, p. 57). But the annulment clause of the Hubbard Building and Realty Company contract (Art. 4, page 38 of Record) provided in express terms that in the event of annulment, all money due or to become due and retained percentages on the contract should be retained by the Government until the final completion and acceptance of the work. In view of the situation as disclosed in the trial and by the findings, persisting through the entire work on this contract, the manner of crediting the value of the property was the natural and safe position for the Government to take as a matter of departmental accounting. It establishes consistently with the previous acts of the Government and its officials a disclaimer on its part of title or ownership of the property; and it establishes likewise an intent on the part of the Government *to pay* for such property.

II.

Even Although it Should Be Held That the United States Did Not in This Case Take the Buildings, Machinery and Materials by Virtue of its Sovereign Power of Eminent Domain, Nevertheless it had the Right Under Paragraph 33 of the Specifications to Hold and Use Said Property in the Completion of the Work, and Therefore the Use by the Respondent of Said Property Under the Circumstances Shown in the Findings was Not Tortious, and Does Not Render the Respondent Liable to the Petitioner for a Conversion Thereof.

It must be conceded that in order to recover the plaintiff in an action for damages for the wrongful conversion of personal property is bound to establish by legal proof:

1. General or special property and possession, or a right of immediate possession, in the plaintiff, at the time of the alleged seizure and conversion.

2. An unlawful seizure and conversion of said property by the defendant to his own use.

Bigelow on Torts, sec. 500, p. 248;
Cooley on Torts, p. 848;
Morey vs. Hyde, 65 Conn. 516;
Byrne vs. Weidenfeld, 99 N. Y. S. 412;
Hall vs. Simmons, 125 Ga. 80.

Title in the plaintiff is not sufficient; he must show that he has not only the title, but also the possession or the right to immediate possession.

The petitioner, in the case at bar has failed to present a case that meets the requirements of this test. It is not by any supposed weakness of the title to the property in question in the respondent that the petitioner can succeed, but solely upon the strength of its own title and its right, if it had any, *to the possession of the property in June or July,* 1910.

That the petitioner was not in either actual or constructive possession of the property at that time or for a long time prior thereto is clearly established. Mr. Ball had on September 9, 1910, deliberately abandoned the work of constructing an important public improvement for the United States Government. He was a contractor operating extensively under and in the employ of the United States Government in the construction of other locks and dams on the Trinity River in Texas, and he knew what Government work means, and particularly what section 33 of the specifications

under the contract for the construction of lock and dam No. 6 meant. His partner, Mr. Cardon, was the president of the Hubbard Building & Realty Company, and although the Findings of Fact do not disclose just what arrangement was made between Mr. Ball and his partner's corporation for the performance of the work of constructing the lock and dam, first by the co-partnership of "Ball-Carden Company" and afterwards by Mr. Ball, individually, nevertheless the Findings do disclose and establish the fact that Mr. Ball received and placed to his own personal and individual credit in the bank where he kept his account, every dollar that was paid by the Government for the work done under the Hubbard Building & Realty Company's contract from December, 1908, to September 9, 1909; and that during the latter part of that period, after the dissolution of the firm consisting of himself and Mr. Carden, he directed the work himself through his superintendent, Oscar Shanks. It is inconceivable that the buildings, plant and materials to do the work required to be done under the contract could have been placed by Mr. Ball and his partner upon the Government reservation and used in and upon the construction by them, without their having full knowledge of the requirements of the specifications for the doing of the work. Mr. Carden was president of the company in whose name the contract stood and in whose name all business with the Government had to be conducted. It was Mr. Carden who made the written applications to the Government for the extensions of time. Whatever the arrangement was that resulted in the doing of the work by Carden and Ball instead of by the Hubbard Building & Realty Company, it is perfectly obvious that the contract between that company and the Government could not have been assigned to Carden and Ball or to anyone else; for by its very terms it was provided that "neither this contract nor any interest therein shall be transferred to any other party or parties" (Findings, pp. 14 and 34, Rec-

ord). And even without this provision, the same prohibition against the transfer of any interest in the contract or the proceeds thereof is made by Section 3737 of the Revised Statutes of the United States, which is as follows:

> "Sec. 3737. No Transfer of Contract. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."

And because the contract could not be assigned to Carden and Ball they were obliged to do exactly what we find they did, in fact, do; namely, they carried on the performance of this public work by keeping alive the corporate existence of the Hubbard Building & Realty Co., one of them being its president, and by using its name in the dealings that they had with the Government Officers; a practice which is often resorted to; which is familiar to everyone who has any experience with Government contracts, and which results in no harm to the public interest, and therefore has been held not to be within the mischief which Congress intended to prevent when it prohibited the transfer of any interest in a contract to which the United States is a party.

Hobbs vs. McLean, 117 U. S. 567;
Fields' Case, 16 Ct. Cl. 434;
Bowe vs. U. S., 42 Fed. Rep. 761.

And to have taken a power of attorney from the Hubbard Building & Realty Company authorizing the attorney to collect the Government payments under the contract and deliver them to Mr. Ball would have resulted in the annulment of the contract under the authority of the decided cases.

Francis' Case, 11 Ct. Cl. 638.

It is fair to assume that experienced Government contractors such as Messrs. Ball and Carden knew, to use the language of Attorney-General Garland, that "the parties to an assignment may suffer damage, but can derive no benefit from an assignment of a Government contract."

18 Op. Atty. Genl. 88.

Mr. Ball was the financial member of the firm and furnished a large part of its capital, which was employed in purchasing the plant and materials and in doing the work under the contract after December, 1908, and until September 9, 1909. He received all of the payments made by the Government during the same period. It was only possible for him to receive these payments by keeping alive and using the name of the corporation in whose name the contract stood and of which his partner was president, because had he taken an assignment of the contract such act would have defeated his purpose by causing its annulment. For all practical purposes he stood in the shoes of the nominal contractor, performing the work and receiving the pay, and as an incident thereto being obliged to place at the site and use the buildings, plant and materials involved in this case.

It is, therefore, for this Court to decide whether a man can accept the benefits of a Government contract, as Mr. Ball has accepted those of this one, and at the same time escape its burdens.

The proposition is this: Can a contractor perform the work called for by a Government contract, the performance whereof requires the use of plant and materials, which he assembles and uses upon the Government reservation, receiving for his work the regular monthly payments made by the Government therefor and, when it suits his convenience, abandon the work and thereafter successfully maintain the position that the plant, materials and even the buildings erected by him on the reservation, which it was necessary for him to place there and use before he could receive the benefits of

the contract, are in no way subject to the terms of the contract in the performance of which they are employed; terms that are reasonable in themselves and that are incorporated in all such Government contracts for its necessary protection?

It would be absurd to contend that the Hubbard Building & Realty Company is not bound by Section 33 of the specifications.

The question, therefore, is, can Mr. Ball step into the shoes of the Hubbard Building & Realty Company and perform the contract in its name, receiving all of the benefits thereof, but remaining unaffected by the provisions of Section 33?

It will be observed that this section is carefully worded so as to include all the buildings, materials, machinery, etc., or any part or parts of same *"prepared for use or in use in the prosecution of the work,"* whether the property of the contractor or otherwise. The only limitation is to be found in the words *"prepared for use or in use in the prosecution of the work."* The buildings, plant and materials assembled upon the work and used by Mr. Ball and his firm were "prepared for use" and were "used in the prosecution of the work." This is conclusively established by Findings of Facts Nos. 3, 5, 7, 8, 9, 10, 14, 18, 19 and 22.

Section 33 of the specifications became operative only "in case of the annulment of this contract as conditionally provided in the form of contract adopted and in use by the Engineer Department of the Army."

The contract could only be annulled upon the happening of the contingency mentioned in Section 4 thereof.

So long as the work under the contract was being prosecuted "faithfully and diligently" in accordance with the specifications, the United States had no right to annul it; and, therefore, had Mr. Ball faithfully continued the work for which he had brought the property upon the site instead of having abandoned the work when it suited his purpose

to do so, his property would have remained unaffected by Section 33.

This immunity could be lost, however, in one way, and in only one way, namely, by a failure on the part of Mr. Ball to prosecute faithfully and diligently the work required to be done.

There was nothing unreasonable and there was no hardship in this situation.

The Government merely attempted to protect itself against delays and excessive cost of completion that might result from the abandonment of the work or the failure to prosecute it faithfully and diligently in accordance with the specifications and requirements of the contract.

It was to the advantage of all concerned that this protection should be afforded by the contract; to the Government, because the work was needed at the earliest possible date and at the lowest possible cost; to the contractor, because having assumed to do the work he would be responsible to the Government for any cost to it, over and above the contract price, incurred in procuring the completion thereof; and to the contractor's surety, for obvious reasons.

It may be argued that Mr. Ball was under no obligation to the Government to continue the work any longer than he might deem it to be to his interest to do so. This may be admitted, but it is nevertheless true that if he chose to abandon the work, his buildings, plant and materials would become subject to the provisions of Section 33 of the specifications, because the Government had expressly stipulated that such result should follow as a necessary consequence of the annulment by it of the contract, and certainly he could not go upon the Government reservation and do work there for the Government upon terms more favorable than those available to the nominal contractor. If he desired to prevent this result, all he had to do was to continue the work, upon which he and his firm had entered, until it

was completed, and then he could have removed his plant from the Government reservation. In that event there would have been no materials to be removed, as they would have become part of the finished structures.

He elected, however, to discontinue the work—he did more than this—he completely abandoned it, as the District Court found as a fact in Finding No. 11 (Record, p. 16), and it is significant, we think, that the abandonment was not the result of any action on the part of the Government, but it was his own *deliberate act.*

The date of his abandonment of the work was September 9th, 1909, and the Government waited until October 22nd, 1909, before taking any action as a result of said abandonment, when it caused to be issued a formal written notice of the annulment of the contract pursuant to its provisions.

The property in question was thereafter kept and held by the Government on the dam site, and it was not until April 30th, 1910, that the Government advertised for proposals for the completion of the work, and not until July 18th, 1910, was the property delivered by the Government to the respondent, nor did the respondent use any of it until it was delivered to it by the Government.

It is thus apparent that the predicament in which the property was placed was the direct and inevitable result of the deliberate act of Mr. Ball in his abandonment of the work for the performance of which he had placed it upon the Government reservation, and which for at least ten months prior to his abandonment he and his firm had used in the prosecution of said work.

If the important right reserved to the Government by the contract and which, as Section 33 shows, is reserved in "the form of contract *in use by the Engineer Department of the Army,*" can be lost by an arrangement between the nominal contractor and the contractor who actually does the work, by which the one doing the work is allowed to do it in the

name and in the place and stead of the nominal contractor, the consequence will be serious, not alone to the Government, but also to all contractors who are in competition for public work with any who may contemplate the creation of a situation that will enable them to play fast and loose with the Government; that is to continue with the work only so long as it is profitable, and withdraw from it with their buildings, plant and materials when it ceases to be advantageous to them to continue.

As above mentioned it is inconceivable, under the circumstances disclosed by this record, that Mr. Ball did not have *actual* knowledge of the provisions of paragraph 33 of the specifications at the time the property in controversy was brought to the site. But be that as it may, he certainly is chargeable with *constructive notice* of these provisions.

This question is left open on the Findings, as the committee who heard the case, instead of finding or stating any ultimate fact on this question of knowledge of Mr. Ball and the petitioner, set forth in his report the detailed facts relevant thereto, supplemented by certain correspondence, included in, and made a part of the report; and this report was adopted unchanged by the District Court on its Finding in this case (Findings 3-10, 12-13; Record, pp. 14-16, 21-23).

As a member of the partnership of the Ball-Carden Company, Mr. Carden was the agent of Mr. Ball in this work.

> "It is one of the fundamental principles in the law of partnership that, within the scope of the partnership business, each partner is the agent of all the other partners for the transaction of the partnership affairs, and his acts are the acts of all."
>
> Mechem on Agency (2nd Edition), 185.

Mr. Carden, as president of the Hubbard Building & Realty Company, and shown to have been actively engaged on this particular work (Record, pp. 14, 15 and 16), had knowledge of the provisions of paragraph 33 of the specifica-

tions. Mr. Carden, the agent of his co-partner, Mr. Ball, having knowledge, Mr. Ball is *charged with notice.*

> "It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal."
> Mechem on Agency (2nd Edition), 1803.

> "It has been held that where several persons have common interests in the same subject-matter, notice to one of them operates as notice to all."
> 21 Am. & Eng. Enc. of Law (2nd Edition, 587, Sec. 8).

But the Government's right to hold and use the property under paragraph 33 of the specifications is not alone to be determined by the knowledge or action of Ball. Mr. Carden, as president of the Hubbard Building & Realty Company, and shown to be in active charge of the work for the company, must be conclusively presumed to have had knowledge of the terms and conditions of the contract and specifications, and he, Carden, acting through his partnership, the Ball-Carden Company, brought this property on the site with this knowledge. His act is binding on the partnership.

The question, therefore, resolves itself into this:

Does the Government under a contract containing a provision such as paragraph 33, acquire the right to take possession and use property brought to the site for the purposes of the construction by a party who knows that it is to be so used, and who knows of the provisions of the contract?

There can be no doubt but that the Government does acquire such right under those circumstances. The conditions make this necessary. The Government was constructing a lock and dam in a remote region of Texas. The buildings were put up and the machinery and material were brought there expressly for this work. The buildings were built to

house the men who performed the labor of constructing the lock and dam. The Government intended to use such buildings, machinery and material as were erected and brought there, if suitable for its purpose, until the work was complete, no matter when or by whom it was completed. Not only is this made evident by paragraph 33 of the specifications, but such is the established practice and custom of the Government; a practice and custom that those dealing with it or with the contractor employed on the work must be presumed to have known.

The practice and custom has grown out of the necessities of the case and the sovereign authority of the Government. Government work must be completed and must be expedited. Its enterprises are inaugurated not for private advantage, but for the public welfare. These enterprises are conducted at far distant and inaccessible points, and the mere assembling of the plant and material is often a most difficult and tedious part of the transaction. For the Government to lose the benefit and use of plant and material when once brought to the building site would entail serious loss of time and add greatly to the cost.

Therefore, it follows that the provisions of paragraph 33 of the specifications, so far as they relate to the taking by the Government, do not confer any new or additional power or authority upon the Government; they merely state rights and powers that the Government inherently possessed without regard to them. They do not confer and, in fact, do not profess to confer, any proprietary rights upon the Government. They merely assert that the Government may take; a power it already had. By the Act of April 24, 1888, Congress authorized the Secretary of War to take and condemn materials needed to enable him to "maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law." (Act April 24, 1888, Ch. 194; 25 Statutes at Large, 94.)

The provisions of paragraph 33 in regard to the valuation of the property is merely an administrative detail, inserted to avoid trouble and exasperating disputes. So far as the property belonging to the contractor is concerned, there can be no question but that this method of arriving at a basis of settlement is valid and binding, and we believe that it is equally binding upon those who are so closely and intimately associated with the contractor as to be reasonably chargeable with knowledge of the provisions of the contract.

For a recent case on all fours with the case at bar, we respectfully invite the attention of the Court to

Tinker & Scott vs. United States Fidelity & Guaranty Co., 169 Fed. Rep. 211 (1909).

This was an action of trover, and the following facts were established:

On the 23rd day of September, 1905, the United States let to Prendergast & Clarkson, a corporation, a contract for the construction of the Shoshone Dam and auxiliary works, Shoshone Project, Wyoming. Section 22 of the specifications, made a part of the contract, was as follows:

> "22. Suspension of Contract. Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or should any question arise as to whether or not the contractor is properly carrying out the provisions of his contract in their true intent and meaning, at any time during the progress of the work, notice thereof in writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the

works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. The failure to order improvement of methods or increase of force, plant, or efficiencies will not relieve the contractor from his obligation to perform good work or finish in the time agreed upon."

It will be observed that the right given to the United States by this specification was to

> "take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under the contract."

Thus, so far as plant and equipment is concerned, the provisions of Section 22 of the specifications under the Prendergast & Clarkson contract correspond with those of Section 33 of the specifications under the Hubbard Building & Realty Company contract. There is a difference between the two, however, so far as materials are concerned, for Section 22 of the Prendergast & Clarkson contract provided that the Government might seize only such materials *as belonged to the contractor* and were delivered on the ground.

On February 26th, 1906, Prendergast & Clarkson, the contractor, entered into a contract with Tinker & Scott, the plaintiffs, whereby Tinker & Scott agreed to furnish Prendergast & Clarkson the entire quantity of crushed stone and sand to be used for concrete in the construction of certain portions of the dam, and further agreed to furnish and main-

tain adequate plant, consisting of power plant, crushing, screening and conveying plant, and all other necessary equipment and appliances that from time to time might become necessary to keep the organized forces of Prendergast & Clarkson furnished with concrete material. Tinker & Scott began work under their agreement and continued until August, 1906, and during that time they assembled at the site a large quantity of tools, plant, implements and equipment for use in carrying on their work, all of which were at the time of the alleged conversion their absolute property. In August, 1906, the Government annulled its contract with Prendergast & Clarkson and seized all of the tools, plant, implements, equipment and materials of every kind and description upon or in the vicinity of the site of the Shoshone Dam, and a new contract having been entered into between the Government and the United States Fidelity Company for the completion of the work, all of this property was delivered by the Government to the new contractor and was used by the new contractor in the completion of the work. Tinker & Scott, claiming that this property had been tortiously taken from them, sued the United States Fidelity & Guaranty Company for the conversion thereof. This property was in the possession of Tinker & Scott, and they were proceeding with their part of the work when the Government annulled the contract because the progress that was being made by Prendergast & Clarkson was not satisfactory to the Construction Engineer in charge thereof, the engineer acting, however, under the orders of his superior officers, as in the case at bar.

We quote from the opinion of the Court:

> "As I construe paragraph 22 of the specifications of Prendergast & Clarkson's agreement to construct the dam and auxiliary works, Shoshone Project, the Secretary of the Interior was authorized, upon a failure by Prendergast & Clarkson to carry forward the work with reasonable dispatch, to take possession of all machinery, tools appliances and animals employed on any part of

the works to be constructed under the contract. The contract does not read 'employed by the contractor,' but all machinery, etc., 'employed on any of the works,' comprehending, by fair and unmistakable intendment, employment by anyone, whether by the contractor or any sub-contractor, so that they were employed upon the works. This rendition becomes more apparent by a further reading of the clause, as follows: 'And of all materials belonging to the contractor delivered on the ground'—thus limiting the materials that might be taken to such as were owned by the contractor and then upon the ground. But as to the machinery, tools and appliances, there is no restriction except that they should be employed upon the work. The Secretary of the Interior is further authorized to use the same—that is, such machinery, appliances, tools and materials as he is empowered to take possession of—to complete the work, or he may employ other parties to carry the contract to completion. * * * It is unnecessary to extend comment upon the testimony showing its bearing and relation and what it tends to prove. It is sufficient that the conclusion of fact is as stated. 'The Government took possession on August 14, 1906, and turned the entire property over to the defendant about the middle of September.' * * * As it relates to the crusher plant, which was in the possession of Tinker & Scott at the time, the Government had the right and authority to take it into its possession, under the terms of the contract with Prendergast & Clarkson, upon their failure to proceed with the construction work, as stipulated in paragraph 22, *the Government having taken possession of this plant under lawful authority, and having turned the same over to the defendant for use in the completion of the work in pursuance of the purpose of Prendergast & Clarkson's contract, the defendant is therefore in lawful possession, and is not chargeable with a conversion of the plant. The power plant was taken by the Government, and turned over to the defendant in the same way, so there is also no liability on the part of the defendant in trover by the real owners, whoever they may be.*" (The italics are ours.)

Certain features of the Tinker & Scott case render it a much stronger case from the standpoint of the petitioner than is the case at bar.

For instance, Tinker & Scott not only had title, but also possession of the chattels in question; they were merely subcontractors under the general contractor, and did not stand in the relation of general contractor to the Government as did Mr. Ball when he and his partner went upon the Government reservation on the Trinity River, placed the buildings, equipments and materials upon it; performed all the construction work that was performed after they took it over and prior to Mr. Ball's abandonment of it; and received all of the Government pay for said work.

Again, Tinker & Scott were in no way responsible for the annulment of the contract which set in motion the Government's right to seize, retain and use, or cause to be used, the plant in the completion of the work; but Mr. Ball's abandonment was the sole cause of the annulment of the Hubbard Building & Realty Company contract.

Tinker & Scott could not maintain an action of trover for the conversion of their plant and equipment, because they had placed it in a situation where it became subject to the right of the United States to appropriate it for the purpose of completing an important public improvement.

We also refer the Court to a case very similar to the case at hand and reported in Vol. 15 of Decisions of the Comptroller of the Treasury, p. 199 (1908).

This case is known as the *Baker Contract Case,* and the contract involved in the case contained a provision similar to paragraph 33 of the specifications in the Hubbard Building & Realty Company contract, viz, that in case of annulment as provided for in the contract the United States reserved the right to purchase the plant and materials prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer.

One of the questions decided was whether the receiver of the contractor was entitled to immediate payment for the plant of the contractor taken by the United States under the above-mentioned clause, or whether the United States Government was entitled to withhold the payment therefor under Article 4 of the contract (an article similar to paragraph 4 of the Hubbard Building & Realty Company contract) until it should be ascertained whether the cost to the United States of completing the work was greater than the price stipulated in the contract with the Baker Contract Company for completing the same.

The opinion declared that paragraph 43 of the specifications gave the Government the right to purchase the plant and materials in use by the contractor at the works on the annulment of the contract. It further decided the point as to the right of the receiver of the contract to immediate payment for such plant, as follows:

> "On exercising that right the Government would have the right to demand delivery if it did not already have possession of the plant; and on delivery, the title to the plant would vest in the United States, and it would be liable for the purchase price; the title to the plant, however, would pass on delivery, and would not be dependent on payment of the purchase price.
>
> "After delivery the right of the contractor and those claiming under it would be a simple demand for the purchase price; but it does not follow, therefore, that the contractor would be entitled to immediate payment of the purchase price without regard to the state of accounts under the contract. In Rolling Mill Co. vs. Ore & Steel Co., 152 U. S. 615, the Court said: 'Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice.' (See also Baer vs. Sleicker, 153 Fed. 129.)
>
> "The right to purchase the plant and the contractor's demand for payment therefor undoubtedly arise out of

the same contract or transaction. The sale on the one hand and purchase on the other mutually have regard to the liabilities springing from annulment of the contract; and there is no provision of the contract which negatives the right of the Government to interpose its counterclaim against a demand of the contractor at this time. Withholding payment of the purchase price is but the exercise of the common right which belongs to every creditor; and the provisions of Article 4 are not a limitation of that right, so as to entitle the Government to withhold only a particular class of money due or becoming due under the contract; but under a fair interpretation of the contract the purchase price of the contractor's plant is money becoming due under the contract, which the Government is entitled to withhold until final completion of the work." (See pages 203-204.)

As showing the practice of the Government under these War Department contracts, we refer the Court to the Digest of Opinions of the Judge Advocate-General of the Army (Howland, 1912), where it is laid down as a rule of action for engineer officers in charge of the construction of public works, as follows:

"Annulment of Contracts by United States.

"XXI D. Where contract provides for taking possession of and retaining plant, etc., of contractor on annulment, use of plant on other improvements."

"The contract for a river improvement provided for its annulment in case of the default of the contractor, and for its completion by the Government, the Government to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way, or quarry privileges, under purchase and at a valuation to be determined by the Engineer Officer in charge. The contractor having defaulted and the United States having taken possession *by way of purchase*, and that for the purpose of giving the defaulting contractor and its surety the proper debit

and credit in final settlement, the plant should be revalued, the United States to receive credit for any depreciation in the value of the plant resulting from its use in the prosecution of the work, and that as there was nothing in the contract requiring the plant to be sold for what it would bring upon the completion of the particular contract, there would be no legal objection to using the plant on other works of improvement, upon giving proper credit to the appropriation from which it was purchased." (C. 27,890, Mar. 6, 1911.)

Digest of Op. of Judge Advocate General Howland, 1912, at p. 288.

Clauses similar to paragraph 33 of the specifications are frequently to be found in public contracts.

Fuller vs. Doyle, 87 Fed. 687-693;

American Bonding & Trust Co. et al. vs. Gibson County, 127 Fed. 671-672 (145 Fed. 872);

International Cement Co. vs. Beifeld, 173 Ill. 179;

Hudson on Building Contracts, Vol. 1, pp. 574, 558, 559, 614 and 615;

Hudson on Building Contracts, Vol. 2, pp. 635 and 644;

P. H. McLoughlin & Co. vs. U. S., 46 Ct. Cl. 138-186;

W. A. Scott vs. U. S., 44 Ct. Cl. 524-531;

Rector vs. McDermott, 13 Southwestern, 334;

Ranger vs. Great Western Co., 5 H. L. C. 72;

Waite on Engineering and Architectural Jurisprudence, secs. 710, 712 and 713.

Such a provision as Section 33 is not to be construed technically as a provision to enforce a forfeiture.

Duplan Silk Co. vs. Spencer, 115 Fed. 689 (Cir. Ct. of Appeals, Third Circuit, 1902).

This was an action of trover brought by the trustee in bankruptcy of a firm of builders who had contracted with the Silk Company to erect a mill for them, charging the conversion of certain chattels consisting of lumber, iron work, bricks, nails, cement and sundry builders' utensils. The bankrupts had practically completed the mill when they became unable to prosecute the work, and the Silk Company terminated the contract and took possession of the materials and utensils under the following clause of the contract:

> "Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, * * * and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall * * * be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor."

It was claimed on the part of the trustees in bankruptcy that the requirements of this article with regard to the notice to the contractors had not been strictly complied with, and as this article provided for a forfeiture a strict compliance was necessary. In answer to this argument, Judge Gray said:

> "The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building,

no suggestion of loss of property to the contractor by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described, would tend to minimize the loss that would otherwise accrue to the contractor from his own default."

(Note—A writ of error in this case was denied.)

See 191 U. S. page 526.

The purpose of the insertion of such a clause as Section 33 of the specifications is well stated by Farwell, J., in Hart vs. Porthgain Harbour Co., Vol. 1, L. R. Ch. Div. 690 (1903), page 696:

> "In my opinion these clauses are put in for the purpose, not merely of enabling the contract to be performed, but also as a due security for its performance. They are not mere machinery to enable Porthgain Harbour Co., either by themselves or by another contractor, to complete the performance of the contract, but they are also a security for the company that the work shall be performed; and the company are entitled to avail themselves of that security, if, by the default of the contractor, the work is not performed at all."

See also—

International Cement Co. vs. Beifeld, *supra*.

It is manifest from the terms of the contract, stated to be the regular form of contract adopted and in general use by the Engineering Department of the Army in all public work contracts; from the rulings of the War Department with reference thereto; and from the decisions of courts, construing the same; that one clear purpose of the Government exists throughout—namely, that, whether or not the Government shall be liable to compensate the true owner for such property assembled at the site "and used, or prepared for use, in the performance of the work," nothing shall interfere with the Government's right to take, hold and use such property,

to the end that the completion of the public work may be prosecuted without delay or unnecessary expense.

This seems to us to be the crux of the present case, and we respectfully submit that whatever rights Mr. Ball, or his corporation, the petitioner, may have against the United States, it is perfectly clear that, viewed from any angle, the United States had the right to do exactly what it did in this case—that is, prevent Mr. Ball from removing his buildings, plant and materials from the site of the lock and dam, and take, hold and use the same for the purpose of finishing the work at a minimum of delay and expense, and that it also had the right to deliver said buildings, plant and materials to the respondent, to the same end; and that this is particularly true when we consider that Mr. Ball stood, to all intents and purposes, in the shoes of the nominal contractor, and that by reason of his voluntary default or abandonment of the work he placed the Government in a position where it was necessary for it to take and hold the property for its protection.

The provisions contained in Section 33 of the specifications were inserted in the interest of the United States as a security and guarantee that the work would be performed to its completion, and as a protection against loss in the event of abandonment of the work by the contractor or anyone standing in the contractor's shoes. It was in the interest, therefore, of the Government that the property taken possession of by Captain Waldron, under orders from his superior officer, should be held by the Government and used in procuring the completion of the work through the employment of another contractor, and the act of the officer in so taking and using it cannot be regarded as tortious.

Bollman vs. Loomis, 41 Conn. 581;
Weinhouse vs. Cronin, 68 Conn. 250;
Mayor, etc., of Macon et al. vs. Huff, 60 Ga. 222;
Smythe's Estate vs. Evans, 70 N. E. 906;
Vol. 31 of Cyc. p. 1147;
Mechem on Agency, secs. 66-67, 455.

The Respondent has already paid to the United States in the form of a monthly rental of $380, the full value of the use of the buildings and plant leased by the United States to it under the assurance contained in Captain Waldron's letter of June 6, 1910, in which he said:

> "The fact that the material and machinery is on the Government reservation, or in the near vicinity thereof, *and the circumstances under which this office has not permitted its removal from the lock site,* is sufficient to assume that the Government has taken possession of the items you speak of at the present time."

It has also paid the United States the sum of $2,640.96 for the material "prepared for use" and which was also turned over to it by the Government. It returned to the Government promptly upon the completion of the work all of the plant used by it under Government authority.

It would be imposing a harsh injustice, and a very great hardship upon the Respondent to compel it to pay a second time for the material, and an exorbitant sum, in addition to the rental already paid by it to the Government, for the buildings and plant that the Government authorized it to use.

Not only will a reversal of the judgment appealed from compel the Respondent to pay twice for the property in question, but such reversal will have a far-reaching and very serious effect upon the administration by the United States Government if it cannot exercise its governmental and sovereign right to seize and take possession of buildings, material, plant and equipment employed upon the construction of public improvements, unless the title to said property happens to be vested and unimpaired in the *nominal contractor,* although the construction work is actually performed by some third party but in the nominal contractor's name, and although that third party may have enjoyed all the benefits of such performance under the contract.

Nor can the Government safeguard its interests by the employment of any more definite language in its public con-

tracts than is to be found in Section 33 of the specifications which are a part of the Hubbard Building & Realty Company contract, where the only qualifying words are those that limit the property which the Government is entitled to seize and hold to that which is "prepared for use or in use in the prosecution of the work."

CONCLUSION.

The judgment below should be affirmed.

All of which is respectfully submitted.

LEWIS SPERRY,
HARRY W. REYNOLDS,
J. KEMP BARTLETT,
Counsel for Respondent.

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Supreme Court of the United States,

OCTOBER TERM, 1918

No. 227.

BALL ENGINEERING COMPANY,
Plaintiff-in-error,

against

J. G. WHITE & COMPANY,
Defendant-in-error.

Brief for Plaintiff-in-error.

The case is here on writ of *certiorari* granted by this Court to review the determination made herein by the Circuit Court of Appeals for the Second Circuit.

The action is for conversion and was brought by the plaintiff-in-error, Ball Engineering Company, a corporation, hereinafter referred to as the "plaintiff," against the defendant-in-error, J. G. White & Company, a corporation, hereinafter referred to as the "defendant," for converting to its own use and using certain material, tools, plant, etc., belonging to the plaintiff. The suit was brought in the District of Connecticut and tried before a referee (designated under the Connecticut practice as a Committee). Two trials were had, the first trial resulting in a judgment in favor of the plaintiff for the value of the converted property (212 Fed. 1009). That judgment was reversed by the Circuit Court of Appeals (223 Fed. 618, 139 C. C. A. 164) and a new trial or-

dered which took place before the same Committee, who, upon the same evidence and the same findings of fact, was constrained, in order to conform to the opinion of the Circuit Court of Appeals (fol. 104) to render judgment in favor of the defendant. The judgment was affirmed by the Circuit Court of Appeals on the authority of its own prior decision in the case (Record, p. 126)—241 Fed., 989, 154 C. C. A. 661.

Statement of the Case.

The facts of the case and the history of the litigation are as follows:

In September, 1909, the United States annulled a contract which it had entered into in 1906 with the Hubbard Building & Realty Company, a corporation, for the construction of Lock and Dam No. 6 on the Trinity River, Texas. At the time of the annulment the work to be done under the contract had not been completed and the Lock and Dam were in an unfinished condition. There were then upon the site of the Lock and Dam certain tools, machinery, plant and materials belonging to the plaintiff (fols. 71-72; 77-78). Shortly prior to May 18, 1910, the defendant was in negotiation with the plaintiff for the purchase or rental of the tools, machinery, plant and materials in question which were still on the Lock and Dam site (fols. 88-89*), but the parties did not agree on the price. Thereupon tht defendant, on May 18, 1910, entered into a contract with the United States for the completion of Lock and Dam No. 6

*The folio and page references in parenthesis are to the Report of the Committee and to exhibits made part of the Report by its terms.

(fol. 87; Defendant's Exhibit 21, fols. 193-274). That contract contained a clause ("Insert E") (fols. 236-238) by the terms of which the United States bound itself to "exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with Hubbard Building & Realty Company to take possession of and retain all material, tools" etc., on the site of the Lock and Dam and to turn the same over to the defendant for use on the work *if asked to do so by the defendant*. The clause also contained the following:

> "It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor (J. G. White, the defendant) concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents." (Fols. 87, 237-238.)

In accordance with the foregoing provisions of its contract with the United States, the defendant, knowing that the property did not belong to the Hubbard Building & Realty Company and that it did belong to the plaintiff, requested the United States to seize the plaintiff's materials, tool, plant, etc., on the Lock and Dam site (pp. 30-31, 63-64). The Engineer Officer in charge of the work for the United States thereupon, under a mistaken

theory of the rights of the United States under paragraph 33 of the contract with the Hubbard Building & Realty Company, to be more fully referred to hereinafter, seized the plaintiff's property, coupling the seizure with an express statement in writing, both to the plaintiff and the defendant, that the materials, tools, plant, etc., "are taken possession of under the provisions of paragraph 33" of the contract between the United States and the Hubbard Building & Realty Company, and that the conditions under which the seizure was made by the United States were those set forth in "Insert E" contained in the contract between the United States and the defendant referred to above, which provided that all liability for the seizure should be upon the defendant and not upon the Government (pp. 30, 97-102).

Immediately upon receiving notice of the seizure the plaintiff protested in writing both to the Government and to the defendant against the seizure (pp. 30-31; letters of June 8, 1910, pp. 96-97).

The findings of the Committee establish, and in fact it has never been disputed, that the Engineer Officer seized the plaintiff's property solely in pursuance of the Government's alleged rights under the terms of its contract with the Hubbard Building & Realty Company and under the claim that the Government had the right under the terms of that contract to take the *plaintiff's* property located upon the Lock and Dam site and to give credit for the value, at an amount fixed by the Engineer Officer in charge of the work, upon the indebtedness of the *Hubbard Building & Realty Company to the United States, witout payment or credit of any kind to the plaintiff, the owner of the property.* (Pages 30-35; see also Defendant's

Exhibit 18, pp. 94-95; Exhibit 21, pp. 79-80; Exhibit 22, pp. 97-102; Exhibit 20, pp. 63-64. All of the above exhibits are by reference incorporated in and form part of the Report of the Committee.)

The position taken by the Engineer Officer was succinctly stated in Defendant's Exhibit 18, a letter from Captain Waldron, the United States Engineer Officer in charge, to the plaintiff, in April, 1910, setting forth the contents of a letter from the United States Chief of Engineers Bixby at Washington to Captain Waldron (Record, pp. 94-95; Committee's Report, fol. 88):

> "The United States has the right, under paragraph 33 of the specifications forming part of the contract to take possession of all or part thereof (plaintiff's property) under purchase at a valuation to be determined by the Engineer Officer in charge. * * * If the right is exercised, the contractor (Hubbard Building and Realty Co., which company did not own the property) will be allowed credit for the fair value of the plant and materials in final settlement; * * * The United States does not recognize Mr. Ball (plaintiff's assignor) in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value."

The defendant's answer in the present suit followed the same theory and alleged in effect that the United States had the right to and did take the plaintiff's property by virtue of paragraph

33 of the contract between the Government and the Hubbard Building & Realty Company (Record, pp. 13-15). The case was defended before the Committee on the first trial on the same theory. Both the Committee and the District Court decided against the defendant upon the merits of that defense and gave judgment in favor of the plaintiff for the value of the property. The Circuit Court of Appeals agreed with the lower Courts *in their rejection of that theory* and stated:

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company."
>
> *J. G. White & Co.* v. *Ball Engineering Co.*, 223 Fed. Rep., 618; 139 C. C. A., 164.

The theory upon which the Circuit Court of Appeals reversed the first judgment, which was in favor of the plaintiff and affirmed the second judgment, which was in favor of the defendant, will be found stated in the opinion of the Circuit Court of Appeals handed down on its decision of the first writ of error and reported at 223 Fed. Rep., 618, and 139 C. C. A., 164. For the convenience of the Court a copy of said opinion is hereto annexed and marked "Schedule A." In that opinion the Court, after summarizing the facts found by the Committee and stating that—

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third

party, by virtue of anything contained in its contract with the Hubbard Company."

reached the conclusion that the judgment of the Court below, in favor of the plaintiff should be reversed for the following reasons, as stated in the opinion:

"All the same it (the Government) did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim and therefore was bound to pay the real owner of the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbar Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company.

* * * * * * * * * * * * *

"We have considered this general subject in U. S. *v.* Buffalo-Pitts. Co., 193 Fed. Rep., 905, affirmed 234 U. S., 228. In accordance with that decision we think that the Government took title to the property in question and leased it to the defendant, who in using

indebted to the Government, and without any payment or credit to the owner of the property.

The doctrine thus enunciated by the learned Circuit Court of Appeals seems to have had its origin in the opinion of that Court in the case of *United States* v. *Buffalo-Pitts Company,* 114 C. C. A., 119; 193 Fed., 905, at pp. 906-907. It is true that the Buffalo-Pitts case was affirmed by this Court (234 U. S., 228), but the opinion of this Court shows conclusively that it rejected the theory upon which the Circuit Court of Appeals had decided the case, and that the affirmance by this Court was because the findings of the trial Court, which were conclusive up on this Court, established the Government's use of the claimant's property without disputing his title or denying his right to compensation, and because an Act of Congress authorized the taking involved in that case. This Court said in part in the Buffalo-Pitts case:

> "We think the Circuit Court and the Circuit Court of Appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurte-

nances, and, if left in its possession, payment would be recommended for such use.

* * * * * * * * * * * *

"While the Government claimed the right to thus take and use the property, it nevertheless held it *without denying the right of the owner to compensation*" (pp. 232-233). (Our italics.)

This is in striking contrast with the facts in the case at bar, which are that, contemporaneously with the taking of its property, the plaintiff objected both to the Government and to the defendant against its use (Finding 16, Defendant's Exhibits 1 and 2, made part of Report by reference, fols. 89, 286-290), and never in any way consented or waived its rights; that the Government ignored the plaintiff's claim and took the position that it had the right to use the plaintiff's property under the contract between the Government and the Hubbard Building & Realty Company (Findings 17, 18, 19, fols. 89-92), and that the Government further claimed to have the right to use plaintiff's property without paying the plaintiff and indeed without *paying* the actual value to anyone, but merely upon crediting to the Hubbard Building & Realty Company the *value of the property as fixed by an officer of the Government at a figure now determined to be $3,500 less than its actual value, as an off-set against the indebtedness of the Hubbard Building & Realty Company to the Government* (Findings 26, 32, fols. 97-98, 103).

We submit that the opinion of this Court in the *Buffalo Pitts case,* clearly indicates that it would have reversed the judgment in that case if the

findings of the Court below in that case had established, as they do in the case at bar, that the owner of the property did not consent to the use of its property on a promise of compensation from the Government, but objected to its property being taken or used, and that the Government did not admit the owner's right to compensation, but denied it, and claimed a right to use the property without payment to the owner, by virtue of an alleged right claimed to exist under a contract between the Government and a third person.

(2) The opinion of the Circuit Court of Appeals in the *Buffalo-Pitts* case referred to and apparently relied upon the following language in the opinion of Mr. Justice Brewer in the *Lynah* case:

> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as owner, it does so under an implied contract that it will pay the value of the property it so appropriates." (U. S. *v.* Lynah, 188 U. S., 445, at p. 464.)

This language must, however, be considered in view (*a*) of the *facts* of the *Lynah* case, (*b*) of the *language used elsewhere in the opinion in that case,* and (*c*) of the *other and more recent decisions of this Court.*

(*a*) In the *Lynah* case the Government had appropriated property belonging to the plaintiffs, by flooding their land in the course of making a public improvement. The Government did not deny the title of the plaintiffs and there was no question at any stage of the case, but that if

compensation was to be paid, the plaintiffs were the persons entitled thereto. The Government did not claim that through any contract entered into with any third person it had the right to flood the plaintiff's lands and pay or give credit to the third person for the value of the property taken. Mr. Justice Brewer, who delivered the opinion of the Supreme Court in the Lynah case, thus summarized the position of the Government:

> "The government did not deny the title of the plaintiffs. It averred in the answer simply that it had 'no knowledge or information sufficient to form a belief,' but did not couple such averment with any denial, nor did it pretend that it *owned* the property or had a *paramount proprietary right to its possession.* It did not put in issue the question of title, but rested upon a denial that the acts its officers had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. *Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs.* It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable the statute of limitations had worked a bar * * * While there was no formal admission of record that the land belonged to the plaintiffs, the case was tried alone upon the theory that the government could not be held responsible for what it had done" (pp. 450-1). (Our italics.)

It will be noticed that Mr. Justice Brewer in the passage from his opinion quoted above,

pointed out that the Government did not claim either (a) to *own the property* or (b) to *have a paramount proprietary right to its possession,* thus distinguishing between *ownership* and a *paramount proprietary right to possession.* In the case at bar while the Government did not claim to own the property, it did claim to have a paramount proprietary right to its possession as against the plaintiff and without any obligation to pay the plaintiff.

Moreover, the opinion of Mr. Justice Brewer refers specifically to the fact that in the Lynah case the Government did not "set up any title to the property antagonistic to that claimed by the plaintiffs." In the case at bar the reverse is true—indeed, the only claim which was set up was absolutely antagonistic to plaintiff's, namely, a claim that the government had under its contract with the Hubbard Building & Realty Company a right to take plaintiff's property without payment to plaintiff.

(*b*) Mr. Justice Brewer in his opinion in the *Lynah* case discussed practicaliy all of the cases theretofore decided by the Supreme Court which involved a determination as to what facts establish a taking by the Government as sovereign upon an implied contract to pay its value, and what facts establish a mere tortious taking. The opinions in each of the cases thus cited contained a discussion as to whether there was or was not an implied contract between the Government and the owner of the property to the effect that compensation was to be paid the owner or whether the facts showed that there was no meeting of the minds, so that the taking was tortious. Thus

Mr. Justice Brewer quoted from the opinion of Mr. Justice Gray in the case of *Hill* v. *U. S.*, 149 U. S., 593, in which Mr. Justice Gray, referring to the cases of *U. S.* v. *Great Falls Manufacturing Co.*, 112 U. S., 645; *Hollister* v. *Benedict & B. Manufacturing Co.*, 113 U. S., 59, and *U. S.* v. *Palmer*, 128 U. S., 262, in which the United States was held upon implied contracts to pay the value of property taken, said:

> "But in each of these cases *the title of the plaintiff was admitted* and in none of them was any doubt thrown upon the correctness of the decision in Langford's case. * * * Here the claimants never authorized the use of the patent right by the Government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. * * * The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close where the mind of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort" (pp. 459-460).

On the other hand, Mr Justice Brewer quoted from the opinion in the case of *U. S.* v. *Palmer*, 128 U. S., 262, among other cases referred to by him, where the facts showed a transaction constituting a contract and not a tort, as follows:

> "No tort was committed or is claimed to

> have been committed. The Government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands from use and occupation under the lease" (pp. 463-4).

(*c*) That the mere fact that the Government did not claim to *own* the property taken by it, is not in itself sufficient to constitute the taking one as sovereign or to create an implied agreement to pay to the owner the reasonable value of the property, where the circumstances show that the Government did not expect to pay the owner for the property, is established by the recent decision of this Court in the case of *Harley* v. *U. S.*, 198 U. S., 229. In that case the Government used a patent device which it did not claim to own, but the circumstances showed that the Government did not intend to pay the owner and did not expect that he would ask for remuneration, for the reason that he was an employee of the Government. On these facts this Court held that there was (*a*) a mere tortious taking and use of the device, and that (*b*) no suit could be maintained against the Government for such tortious use. The Court said that the fact that there was no meeting of the minds of the parties distinguished the case from *McKeever* v. *United States*, 14 Ct. Cl., 396, and *United States* v. *Lynah*, 188 U. S., 445.

Finally, in the *Buffalo-Pitts* case this Court re-

ferred with approval to and reaffirmed the ruling laid down in the *Harley* case. (*United States* v. *Buffalo-Pitts Co.*, 234 U. S., 228, at pp. 232-233.)

(3) From the foregoing analysis of the *Lynah* case and the other cases referred to, it seems clear that the only proposition, for which the *Lynah* case can be said to be authority, is that there is a presumption that the Government takes property as sovereign and impliedly agrees to pay the reasonable value thereof to the owner, when it appears that the Government has appropriated property and (in the language of the *Lynah* case) the Government does not "pretend that it *owned* the property or had a *paramount proprietary right to its possession,*" and the Government does not "*set up any title to the property antagonistic to that claimed by the plaintiffs.*"

It is also clear, that where it appears as it did in the *Harley* case (*supra*), that although the Government admitted that it did not own the property, it claimed or believed that it had the right to use it without paying the owner, the taking must be held to be not upon an implied agreement to pay the owner, but, on the contrary, must be held to be tortious.

(4) The defendant in its brief filed in this Court in opposition to the plaintiff's motion for a writ of *certiorari* cited the case of *United States* v. *Societe Anonyme Des-Anciens Etablissements Cail*, 224 U. S., 309, in which a claim was allowed against the Government for royalties on a patented invention for use on large guns, on the theory that there was an implied contract be-

tween the claimant and the Government. Defendant's brief set forth *verbatim* the letter dated September 3, 1891, from Admiral Ramsay to the Secretary of State, but failed to quote or refer to the letters of the Chief of the Bureau of Ordnance and of the Secretary of the Navy in December, 1894, which this Court said in the opinion in that case superseded the earlier letter and constituted a reversal of the position of the Government with respect to the rights of the claimants, the *Societe Anonyme*. This Court, in its opinion in the *Societe Anonyme* case, expressly stated, referring to the letter of September, 1891:

> "*But the position taken in that letter was, as we have seen, abandoned,* and it was declared that so far as the De Bange patent was valid, its claim for royalties was, in the opinion of the Bureau of Ordnance, a proper one, and would be sustained by the courts. *This was in 1894.* Prior to that time and afterwards the government continued to use the device. We think the court of claims had jurisdiction." (Our italics.)
>
> *United States* v. *Societe Anonyme Des Anciens Etablissements Cail,* 224 U. S., 309, at p. 322.

In the case at bar it is undisputed that the Government deliberately and unequivocally took the position that it had the right to seize the plaintiff's property without payment or compensation to the plaintiff. In the *Societe Anonyme* case, on the contrary, the facts were, as stated by this Court in its opinion:

"The officers of the government knew of

the De Bange invention and were aware of its great importance and the purpose to deliberately take property of *another* without the intention that *he* should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. *On the contrary, the record shows that compensation was contemplated.* There was doubt as to the extent of it, because there was no doubt as to how far the devices used were attributable to or belonged to De Bange, or whether they constituted an infringement of his patent, and *therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it.*" (Our italics.)

United States v. *Societe Anonyme, Etc., Cail,* 224 U. S., 309, at p. 320.

(5) The question raised in the present case is not whether the Government was *competent* to take the property *as sovereign,* but whether *it actually did so take the property.*

While the Government did not claim to be the *owner* of the plaintiff's property, it did claim to have the right, *by virtue of its contract with the Hubbard Building & Realty Company and the indebtedness owing by the Hubbard Building & Realty Company to the Government,* to take the property without any payment to the owner, but merely upon *crediting,* upon the indebtedness of the *Hubbard Building & Realty Company* to the Government, the *alleged value* of the property fixed by a Government employee in accordance with the provisions of the Hubbard Building &

Realty Company contract, such amount being $11,578, *which was $3,500 less than the actual and reasonable value of the property as found by the Committee,* which was $15,000. (Findings of Committee, 17, 18, 19, 26, 32, Conclusion 2, fols. 89-93; 97-98, 103-106.)

It is difficult to see how any claim could partake more of a proprietary nature and less of the character of a taking as sovereign. The whole theory of the taking as sovereign is that the Government takes the property not because it has any lien upon it or title to it or contractual claim of any kind, but merely because as sovereign it has use for the property, to which except for the fact of the sovereignty it would have no right.

The situation in the present case, however, is the exact reverse in every respect of a taking as sovereign, and is exactly such a claim as might be made by any individual who had entered into a contract containing the clause in question. It is a claim that the Government—

1.—Was not bound to pay or credit the plaintiff at all;

2.—Was not bound to *pay* the Hubbard Building & Realty Company anything;

3.—Had what amounted to a lien upon the property to enforce payment of indebtedness of the Hubbard Building & Realty Company to the Government; and

4.—Could take the property on giving a credit to the Hubbard Building & Realty Company, not of the *actual or reasonable value,* but merely of

the value *as fixed by an officer of the Government at an amount which was much less than the actual value.*

As a matter of fact, practically all of the authorities cited by the respondent on its original writ of error to the Circuit Court of Appeals, in support of the claim that the Government had the right to take the property of the plaintiff under paragraph 33 of the contract between the Government and the Hubbard Building & Realty Company, and credit the value thereof as fixed by the Government engineer upon the debt owed by the Hubbard Building & Realty Company to the Government, were cases involving building contracts *between private persons.* The claim urged upon the Committee and upon the Circuit Court of Appeals by defendant's counsel was that the Government had the right to take the plaintiff's property upon crediting the Hubbard Company with the value as fixed by the Government engineer, on the theory that the plaintiff had constructive notice of the provisions of the contract between the Government and the Hubbard Building & Realty Company. Such a right would, of course, have been purely of a proprietary nature, such as is ordinarily claimed by private individuals.

It therefore seems clear that the taking of the plaintiff's property was, in the language of the Supreme Court in the *Lynah* case, taking under a claim on the part of the Government of *"title antagonistic to that claimed by the plaintiff's,"* and was also under a claim of *"paramount proprietary right to its possession,"* and was not a taking by the Government as sovereign.

(6) The foregoing was written prior to the decision of this Court in *Tempel* v. *United States* on December 9, 1918. That was a suit to recover the value of property taken by the Government in making a river improvement. The Government did not claim that it *owned* the lands of the claimant, but did claim that it had the *paramount right* to use the same and to make improvements thereon for purposes of navigation without the payment of compensation. This Court said that—

> "the law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded a property right of the plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such the Tucker act affords no remedy." (Citing the *Hill* and *Schillinger* cases, *supra*, and distinguishing the *Lynah* case and *United States* v. *Cress*, 243 U. S. 316.)

We submit that the reasoning of the opinion of this Court in the *Tempel* case is decisive in our favor of the questions discussed under the present point of this brief.

II.

Since the taking by the Government was tortious, this plaintiff cannot recover the value of its property from the Government.

All of the cases on the subject of a taking by the Government recognize the fact that in some

cases the Government takes the property upon an implied contract to pay for it, and in other cases officers of the Government take property without such an implied contract, *and that in the latter case the taking is tortious.* See quotation from the opinion of Mr. Justice Gray in *Hill* v. *U. S.*, 149 U. S., 593, at page 15 of this brief.

From what has already been said under Point I (*supra*) it seems clear that no agreement on the part of the Government to pay the plaintiff the value of its property can be implied in the present case and that consequently the taking was not as sovereign, but was tortious. In fact, as we read the opinion of the Circuit Court of Appeals on the first writ of error it recognized that the taking was or at least may have been tortious, as it stated:

> "It (the Government) made no proprietary claim, and therefore was bound to pay the real owner for the property *whether the taking was tortious or not.*"

It follows, from the fact that the taking of the plaintiff's property was tortious, that the plaintiff cannot recover from the *Government* the value of the property, either in an action for damages for the tort or in an action on the common counts.

In the decision of the Circuit Court of Appeals for the Second Circuit in *U. S.* v. *Buffalo-Pitts Co.*, 193 Fed. Rep., 905, that Court expressed the view that claims may be prosecuted against the United States under the Tucker Act even if sounding in tort. That Court based its ruling on that point upon certain language which had been used by Mr. Justice Brown in *Dooley* v. *U. S.*, 182 U. S., 222,

and in the concurring opinion written by the same justice in the case of *U. S.* v. *Lynah*, 188 U. S., 445, at p. 475, and upon the alignment of the vote of the justices of this Court in deciding those and other cases.

There apparently was not called to the attention of the Circuit Court of Appeals at the time of the decision in the *Buffalo-Pitts* case, however, the decision of this Court in *Russell* v. *U. S.*, 182 U. S., 516, to the effect that *the Court of Claims did not have jurisdiction under the Tucker Act over obligations arising from tort.* The ruling made in the *Russell* case upon that point was followed in *Harley* v. *U. S.*, 198 U. S., 229, and has been reaffirmed in *U. S.* v. *Buffalo-Pitts Co.*, 234 U. S., 228, at pp. 232-233 and in the recent case of *Tempel* v. *U. S.*

It is therefore established that no recovery can be had against the Government to recover the value of property which has been tortiously taken by an officer of the Government.

The effect of a decision of the Circuit Court of Appeals in the present case, is that the plaintiff is thereby deprived of a recovery against the defendant, the only tort feasor against which it can bring suit for the conversion of its property, and the one which, as between the two (the Government and the defendant), it was agreed should be liable.

III.

No title can be acquired by a tortious taking.

As already pointed out, the decisions of this court on the subject of taking of property by the

Government, all distinguish between a taking by a Government as sovereign and a taking which is tortious. The language of these opinions indicates that a taking which is tortious is not a taking as sovereign, but that, on the contrary, the two classes of takings are mutually exclusive. We have also pointed out that no recovery can be had against the Government for tortious taking.

In addition to these considerations it seems that the Circuit Court of Appeals, in holding that the Government *acquired title to the plaintiff's property,* overlooked the well established rule that no title can be acquired by a tortious taking of property. *Birdsell and Birdsell Mfg. Co.* v. *Gerhart Shallioe and Feikert,* 112 U. S., 485; *Lovejoy* v. *Murray,* 3 Wall, 1.

IV.

The Courts below were correct in holding that the Government had no right to take the property of the plaintiff by virtue of anything contained in the contract between the Government and the Hubbard Building & Realty Company.

As already pointed out, all of the courts before which this litigation has come, are in harmony on the proposition that the plaintiff's rights to its property were not subject to the terms of the contract between the Government and the Hubbard Building & Realty Company and that even if the plaintiff's property had been within its operation,

the terms of the contract could not be construed as authorizing the taking of the plaintiff's property by the Government officials (Committee's Report, fols. 104-107; opinion of District Court, 212 Fed. 1009; opinion of Circuit Court of Appeals, 223 Fed. 618, 139 C. C. A. 164).

The questions presented on this branch of the case narrow themselves to an inquiry, (a) was the plaintiff's property brought within the operation of the contract between the United States and the Hubbard Building & Realty Company; and (assuming for the purpose of argument that the property was brought within the operation of the contract) (b) what was the meaning and effect of the paragraph and (c) did the acts attempted to be done by the Government under it constitute a compliance therewith.

A.

Neither the plaintiff nor its predecessors in title in the ownership of the property in question ever entered into any contractual relation which had the effect of bringing their property within the operation of the Government's contract with the Hubbard Building & Realty Company, and therefore, no matter what construction be placed upon paragraph 33 of that contract it could not affect the plaintiff's title to the property.

The defendant's theory upon the first trial was that by virtue of the provisions of paragraph 33, the Government had the right to take possession of and to acquire title to the plant, machinery and materials belonging to the *plaintiff* by giving credit to the *contractor*, the Hubbard Building & Real-

ty Company, for the value of such property as fixed by the Government officer. The claim is in effect that the Government had the right to take the property of one and pay another. Such a right, if it existed, would be in extreme derogation of the common law rights of the owner of the property and could only rest on the contractual consent of the owner of the property so sought to be taken. It is evident that no property owner will be held to have subjected himself to the loss of his property in such a way unless it clearly appears that he entered into some voluntary agreement by which he released his ownership in his own property to the extent described.

This was the ruling of the Committee who held that Clause 33

> "does not, as a matter of law, authorize the United States to purchase materials, tools, etc., belonging to a third party, in the absence of agreement of the owner to assent to the provisions of paragraph 33." (Fol. 106.)

(a) The defendant, therefore, is confronted at the outset with the fact that the record contains no finding that the plaintiff or its predecessors in title, Ball-Carden Company and Ball, were parties to or ever became parties to the contract in which paragraph 33 is found or that they entered into any contract by which they assented to or agreed to be bound by the provisions of paragraph 33.

It appeared that the Hubbard Building & Realty Company was a Texas corporation which in 1906 entered into a contract with the Government for the construction of Lock and Dam No. 6, and presumably carried on the work under that contract, as work was done under the contract long

before the Ball-Carden Company took any property upon the site (fols. 72-73).

The Committee found that in 1908 the Ball-Carden Company

> "purchased the property enumerated in paragraph 33 of the complaint herein; the great majority thereof was new when placed on the site of said Lock and Dam, and all of said property was purchased with moneys furnished by said P. D. C. Ball; said property was placed by said co-partnership at the site of said Lock and Dam, and was thereafter and until in or about the month of May, 1909, used by said co-partnership in the construction of said Lock and Dam" (Finding of Fact 5, fols. 73-74).

The Government never recognized the Ball-Carden Company in any manner and always dealt solely with the Hubbard Building & Realty Company (fols. 283-284).

The Committee also found that

> "It did not appear under what circumstances either the plaintiff or said P. D. C. Ball, operating under the name of the Ball Engineering Company, undertook to perform said work or furnish said material, nor did it appear under what circumstances said Ball-Carden Company entered upon said work, other than that this was done without the actual knowledge of said P. D. C. Ball, who did not learn thereof until two or three months later" (fol. 86).

There was therefore no privity between the Government and the Ball-Carden Company or the

plaintiff and no contractual obligations existed in favor of either party.

> *United States* v. *Driscoll*, 96 U. S. 421;
> *Baltzer* v. *Raleigh & Augusta R. R.*, 115 U. S. 634;
> *Patton Paint Co.* v. *Llyod*, 156 Fed. 770, C. C. A. (Circuit Court of Appeals Third Circuit).

(b) There is no finding that the terms of the contract between the United States and the Hubbard Building & Realty Company or the provisions of paragraph 33 were known to the Ball-Carden Company or to Ball or Carden at the time the property was placed upon the work, or at any other time until this controversy arose in the spring of 1910. The plaintiff's representative Shanks did not go to Texas until June, 1909, and at that time all of the property involved in the suit was already upon the site of Lock and Dam No. 6.

> "No portion of the property mentioned in the complaint was brought upon the work after the arrival of Mr. Shanks at Lock and Dam No. 6" (Finding of Fact 10, fol. 80).

It does not even appear that after Shanks arrived in Texas in June, 1909, he obtained any knowledge of paragraph 33. While that paragraph was contained in a portion of the written contract with the Hubbard Building & Realty Company headed "Specifications" (fols. 122-164) an examination of the contract as printed in the record will show that the so-called specifications were really merely formal provisions of the adver-

tisement attached to the contract under the heading "General Conditions" (fol. 137, 144) and did not relate to the details of the actual work to be done as do the ordinary specifications of a private building contract.

The Committee in making his findings gave to the defendant the benefit of all the evidence upon the subject of the work done by the Ball-Carden Company upon Lock and Dam No. 6 (Findings of Fact 5-14, fols. 73-86). No finding, however, furnishes the slightest basis for a legal determination that the provisions of paragraph 33 were known to the plaintiff or the plaintiff's assignors when the property was taken upon the work.

The most that can be claimed by the defendant is that the Ball-Carden Company had knowledge that there was in existence a contract between the Government and the Hubbard Building & Realty Company for the construction of Lock and Dam No. 6. Therefore, if the Ball-Carden Company by taking its property upon the work did so at the peril of losing its title thereto, if the contract between the Hubbard Building & Realty Company and the Government so provided, then, every person who undertakes to do work, knowing merely of the existence of a contract between the contractor and the owner of the land, takes his plant and machinery upon the work at the risk of losing it without receiving payment for it.

(c) *The question presented, therefore, is whether the Ball-Carden Company merely by doing work on the Lock and Dam site relinquished its title to its plant, machinery and material in*

use or prepared for use in the transaction of the work.

The argument of the defendant is, as we understand it, that although the Ball-Carden Company may not have had *knowledge of the terms* of the contract, its knowledge that there was a contract gave it *constructive notice* of all of the terms of the contract, including paragraph 33, and that by doing work on the Lock and Dam site it thereby subjected such property as it took upon that site to the terms of the contract. The effect of this claim, if allowed, would be that two contracting parties could, by their own agreement, divest a third person of his property by agreeing, among themselves, that if the third person, knowing of the existence of the contract, but in ignorance of its terms, brought his plant and machinery for use upon the site of work being done under the contract, such property should then become the property of one of the parties to the contract. It is safe to say that the doctrine of constructive notice has never been pressed to this extent by any court.

The doctrine of constructive notice has always been limited by the courts to cases where the facts actually made known were in some way suggestive to a reasonable man of the existence of the other facts of which constructive notice was thus held to be given.

Birdsall v. *Russell*, 29 N. Y., 220, at p. 225.

Johnson v. *Erlandson*, 14 North Dakota, 518; 105 N. W., 722.

In the case at bar, there was nothing in the fact that a contract was in existence between the Government and the Hubbard Building & Realty Company to suggest to the Ball-Carden Company that by the terms of that contract the parties thereto had attempted to provide that the property of third persons who did work upon the Lock and Dam site should, in the event of the annulment of the contract, be subject to be held by the Government without payment or compensation being made therefor, except to the contractor. There would be as much reason for arguing that a carpenter taking his tools upon real estate or into a building occupied by a tenant under a lease from the owner of the land, was bound to inquire into the terms of the lease to see if it contained a provision providing that any personal property of third persons brought upon the premises thereby became the property of the land owner.

It therefore appears not only that there was no contractual relation between the Ball-Carden Company and the Government, but that even if there had been such a contractual relation there was nothing in the circumstances to give to the Ball-Carden Company constructive notice of such an unusual provision as it is claimed the contract contained.

(d) How unreasonable is the defendant's claim, that the owner of plant, machinery and materials who takes it on the site of building operations to use it in doing work, is chargeable at his peril with constructive notice of the terms of a contract between the owner and the contractor, to the effect that property thus brought on the work may be seized by the owner of the land without payment,

except to the contractor, is emphasized by the fact that the defendant has never cited a decision of any court sustaining such a claim. We think it is safe to say that no court has ever permitted the property of a third person to be taken without compensation, under the terms of a contract, to which such third person was not a party and to the terms of which he had not expressly assented and with full knowledge of its contents agreed to be bound.

Only one case has ever been cited by the defendant in which, under any circumstances, the property of a third person was held subject to the terms of a construction contract. *Tinker & Scott* v. *U. S. Fidelity & Guaranty Co.*, 169 Fed., 211. (Circuit Court, District of Oregon, 1909, Wolverton, *D. J.*) The wide distinction between that case and the case at bar is apparent from the fact that the third parties, in that case, Tinker & Scott, had entered into a written agreement with the contractors, Prendergast & Clarkson, to furnish crushed stone and sand for a Government work and to do a portion of that work. This written agreement between the third parties (Tinker & Scott) and the contractors *expressly referred* to the contract between the Government and the contractors and contained provision that in case of the failure from any cause whatever on the part of the third parties to carry out their agreement, *all of their plant, equipment and appliances were to remain on the works* for the use of the contractors *free of cost, until the contract should be* finished; and further provided that the third parties

"should be bound by the plans, *specifications*

> and instructions furnished by the United States Government to Prendergast & Clarkson, the contractors, in their entirety, and with no exception whatever."

The third parties, Tinker & Scott, therefore had express notice of the terms of the contract between the contractors and the Government, and *had agreed in terms to be bound by such contract;* and had further agreed that in case they ceased work their property would remain on the site of the operations until the contract was finished.

Under these circumstances it was not strange that the Court should say, as to a clause contained in the *specifications:*

> "Tinker & Scott are, by their specific agreement with Prendergast & Clarkson, as much bound by this condition as the latter, for it is made a part of their contract" (p. 215).*

In the courts below the defendant cited the *Baker* case (Decisions of the Comptroller of the Treasury, Vol. 15, p. 199) but that case merely held that a clause similar in some respects to the one here involved gave the Govemnment only an option to purchase the property of the contractor and that nothing more was intended than an ordinary purchase and sale. No property belonging to any third person was in any way involved in that case and the controversy arose directly between the Government and the receiver of the contractor who was the owner of the property, the question involved being with

*Judge Wolverton's decision in the Tinker & Scott case also involved other property as to which a recovery was granted against the defendant for conversion upon facts substantially identical with those in the case at bar (See page 216).

respect to the *time* when payment should be made for the property as to which the Government elected to exercise its option of purchase.

Another case which has been cited by the defendant is *Duplan Silk Co.* v. *Spencer,* 115 Fed. 689, in which the controversy arose directly between a private land owner and a trustee in bankruptcy of the contractor. No property of third persons was involved nor was there any claim that the paragraph there in question could be made use of to effect the property of third persons.

The cases and text books referring generally to somewhat similar clauses in building contracts do not contain the slightest intimation that such clauses could be construed, or were intended to deprive third persons of their title to their own machinery and material which they might bring upon the site of operations in doing work thereon.

It is highly unreasonable, therefore, to say that the Ball-Carden Company or the plaintiff could have foreseen or had notice that any claim would be made that they had imperiled their title to their own machinery and material merely by taking it upon the Lock and Dam site and doing work upon the Lock and Dam. In view of the diligent research into this subject, which has evidently been made by defendant's counsel, it is safe to say that the whole history of litigation relative to building contracts does not disclose a single instance of a similar attempt to acquire personal property from its owner under similar circumstances by virtue of any doctrine of constructive notice and in the absence of some express contractual obligation voluntarily entered into with knowledge on the part of the owner of such personal property.

B.

A right to "purchase" plaintiff's property could not be exercised by seizing it and making payment to the Hubbard Building & Realty Company.

Even if it be assumed, for the purpose of argument, that the plaintiff by bringing its property upon the site of the Lock and Dam subjected it to the operation of paragraph 33, nevertheless the Government could not thereby acquire any rights except such as appeared on the face of the paragraph in question, giving the language used a fair and reasonable construction. By its express terms the paragraph only permitted a *purchase* of the property.

The Committee found as a conclusion:

> "5. That said paragraph 33 does not authorize the United States to purchase materials, tools, etc., prepared for use or in use in the prosecution of the work save on payment to the owner thereof at a valuation to be determined by the Engineer Officer in charge" (fol. 107).

The findings show that it was well understood by the defendant at the time it requested the Government to take possession of the property under paragraph 33 that such action on the part of the Government was to be in disregard to the rights of the plaintiff, and that no payment was to be made to plaintiff.* (See Insert E of the Defend-

*The statement in the opinion of the Circuit Court of Appeals on the first writ of error, that Insert E was immaterial because contained in a contract to which the plaintiff was not a party, entirely overlooked the fact that the Government adopted Insert E as its statement to the plaintiff of the terms on which it took the plaintiff's property and expressly notified both the plaintiff and defendant to that effect after the defendant had asked the Government to seize the property under the provisions of that paragraph. (See Defendant's Exhibit 20 at fol. 191, and Defendant's Exhibit 22 at fols. 301-305.)

ant's Exhibit 21, fols. 236-238; Defendant's Exhibits 1 and 2, fols. 286-290.) Under such circumstances, the defendant must stand or fall on what was done by the Government. If the acts of the Government did not constitute a compliance with the contract and a *purchase* of the plaintiff's property, then the Government's act was clearly unauthorized and the defendant's possession and use of the plaintiff's property was clearly wrongful as against the plaintiff.

> *Tinker & Scott* v. *U. S. Fidelity & Guaranty Co.*, 169 Fed. Rep., 211 at page 216.

The language of the paragraph may well be considered in the light of the defendant's claim, that it put the Ball-Carden Company upon notice when it began to work upon Lock and Dam No. 6, that its property could be seized by the Government and payment made to the Hubbard Building & Realty Company. It is evident that the owner of the plant and machinery could, at most, only be held to have notice of provisions which were actually contained in the contract and that provisions by which it is sought thus to deprive him of his own property without payment therefor, should be extremely explicit in the statement of the unusual rights thus conferred.

A provision, to have the effect claimed for this clause should expressly provide that machinery or materials belonging to any one other than the contractor, and brought upon the work, were so brought upon the work under peril of being seized by the Government in the event of the annulment of the contract, *and that in the event of such seizure by the Government payment for such*

property would be made not to the owner thereof but to the contractor.

There is nothing in the language of paragraph 33, however, which would even remotely suggest to the owner of personal property, who examined the contract before taking his property upon the work, that he did so at the peril of its being retained and payment made to the contractor instead of to the owner. The language of paragraph 33 is plain and simple and susceptible of but one construction, namely a right to *purchase* whatever property was included within the operation of the paragraph. Such language, both in common parlance and in technical legal meaning, implies a sale by the owner of the property and the payment of the purchase price to the owner, and affords no possible basis for an inference that it permits the seizure of property of a third person upon payment to the contractor. The most that can be claimed as the effect of the paragraph, is, that the property could be taken by the Government, *under purchase,* at a valuation to be determined by the Engineer Officer in charge; or, in other words, that the Government would have an option to purchase the property by paying *the owner* the valuation as so determined. The word "purchase" implies a payment to the owner of property, and is the antithesis of a seizure or confiscation.

To "purchase" is to buy, to secure or obtain by expenditure of money—to acquire for a valuable consideration, "bought or acquired by paying a price."

Curtiss v. *Burdick,* 48 Vt., 166, 171;
Berger v. *U. S. Steel Co.,* 63 N. J. Eq., 809.

The idea of purchase imparts a sale.

Matter of White Plains Comm'rs, 71 N. Y. App. Div., 544, 549;
Grant v. *Reno*, 114 Mich., 41, 44.

It implies taking full title.

1 Edw. Ch. (N. Y.), 1, 6; 12 Ky. L. R., 216, 221.

Purchaser means a buyer in the ordinary commercial sense.

10 Ch. D., 622, 625.

Paragraph 33 was evidently not inserted for the financial protection or security of the Government. Such financial protection to the Government was provided for by other clauses of the contract with the Hubbard Company. Pararaph 22 of the specifications provided that—

> "The bidder to whom award is made will be required to enter into written contract with the United States with good and true security in an amount of not less than twenty-five per cent. of the amount of the contract, within ten days after being notified of the acceptance of his proposal" (fol. 135).

Paragraph 30 of the specifications provided that—

> "Payments will be made monthly except when otherwise herein specified on estimates of results accomplished during the preceding month. A percentage of ten per centum will be reserved from each payment until the completion of the contract" (fol. 138).

Defendant has also argued from the fact that an assignment of the contract or of any interest

therein was prohibited, that the Government had the right to assume that the various individuals or firms engaged in doing actual work on the Lock and Dam No. 6 were so engaged under the contractor or as its agents or servants.

The provisions prohibiting an assignment of the contract, however, did not create the slightest inference that any machinery or plant in use on the work was owned by the contractor, and the provisions of the contract are wholly inadequate to raise any implication that property brought upon the site of the work to be used by such third persons could be deemed by the Government to be owned by the contractor so as to offset its value against a debt for the purpose of making payment in the event of a purchase under paragraph 33.

The Government was benefited and not injured by the fact that the Ball-Carden Company did work upon Lock and Dam No. 6 and took its plant and materials upon the site. Not only was the progress of the work advanced by the operations of the Ball-Carden Company after the Hubbard Building & Realty Company had practically abandoned the work, but such operations also added to the amount of the reserve percentage held by the Government as security for the completion of the work. That the Government did not consider itself aggrieved and was willing that the plaintiff should dispose of the property appears affirmatively from the fact that when Mr. Ball and the plaintiff claimed the property in March and April, 1910, the Government, through the Chief of Engineers and the United States Engineer Officer in charge, stated in writing that:

"If the owners of the property can come

> to a satisfactory agreement with the contractors who are to complete the work, for the rental of the plant, and the purchase of the materials, it is probable that the United States will not attempt to exercise the right to purchase the property under paragraph 33 of the specifications." (Finding 16, fol. 88; Defendant's Exhibit 18, fol. 284).

Thereafter negotiations were had between the plaintiff and the defendant looking toward the purchase or rental by the defendant of the plaintiff's property, but the parties did not agree on the price (Finding 16, fols. 88-89). The record shows that throughout the entire controversy it was the defendant, and not the Government, which was the moving cause of the seizure of the plaintiff's property.

In conclusion it should be noted that the language of the paragraph does not expressly state in terms that it is intended to apply not only to property belonging to the contractor, but also to property belonging to others. Parties ordinarily attempt by their agreements to affect only their own property and an intention to try to burden the property of others with the obligations of a contract ought not to be presumed in the absence of language which very clearly evidences that intention.

The paragraph, if construed to refer only to the property of the Hubbard Building & Realty Company and merely to give the Government the option of purchasing the property of that Company of the nature described in the pragraph, was a perfectly natural and reasonable provision. If it be sought, however, to extend the purview of the paragraph to the property owned by others than the contractor, the result is little short of absurd.

In any event, however, paragraph 33, as already demonstrated in this point and as expressly held by the Committee, authorizes only a *purchase* of property, requiring payment to the *owner* for any property retained under the provisions of that paragraph. As the Government officer attempted to take the property without paying the owner, his act was not in conformity with the contract even if the property had been within its operation.

C.

The Government in purporting to exercise its alleged rights under paragraph 33, attempted to retain the plant under lease. Since paragraph 33 did not permit the Government to retain property under lease but only to retain it under purchase, such an effort to lease was wholly nugatory and did not vest any title, interest or right to possession in the Government.

The only right given by paragraph 33 was a right to retain the property *under purchase.* Consequently even if title to the property in question had been in the Hubbard Building & Realty Company, so that it could have been purchased by the Government under the terms of paragraph 33 on payment to that company, still the action taken by the officer of the Government in June, 1910, would not have been effective to vest in the Government any title, interest or right to possession at the time of the use of the property by the defendant in the summer and fall of 1910, because such action was (except as to the materials as distinguished from the plant) not a retaining under *purchase* but an attempt to retain under *lease.*

There was no physical act of taking or retention by the Government. The only taking or retaining

was by the sending of the letters of June 6, 1910, and June 22, 1910, from Captain Waldron to the Hubbard Building & Realty Company (Committee's report, findings 17, 18 and 19, fols. 89-93; 291-305.)

The letter of June 6, 1910, to the Hubbard Building & Realty Company (Defendant's Exhibit 22, fols. 291-305) indicates clearly that the Government was not purchasing the plant but only leasing it. In that letter Captain Waldron, after quoting insert E of the specifications of the contract between the Government and J. G. White & Company, the defendant, proceeds:

> "Due to other business which requires my attention for the next two weeks, it will be impossible for me to place a *fair rental value on the items of plant and a fair purchase value on such materials as are used* much before the end of the present month" (fol. 304).

The language used by the Government officer as set forth in Finding 19 of the Report of the Committee, fols. 92-93, is wholly inconsistent with a purchase and the taking of title by the Government, and is quite clearly an attempt to *lease the property (except the material) without a purchase.*

If any doubt remained, however, that the Government was only attempting in June, 1910, to lease the property and not to purchase it, such doubt would be completely dissipated by the letters of November 10, 1910, and January 30, 1911 (Plaintiff's Exhibits D and E, fols. 333-344, made a part of Report of Committee Finding of Fact 27, fols. 98-99).

The action of the Government in crediting the rental of the property to the Hubbard Building & Realty Company is a further confirmation that

the Government was merely seeking to rent the property (see Finding 32, fol. 103).

The position of the defendant was in no respect improved by the fact that in the final account between the Hubbard Building & Realty Company and the Government, almost a year after the defendant began using the property, a credit was given to the Hubbard Building & Realty Company for the value of the plaintiff's property (Findings of Fact 26, 32; fols. 97-98).

Such action in April, 1911, could not, under any possible theory, retroactively change the nature of the Government's alleged possession in the prior summer and fall. *The character of the possession of the Government and the defendant in the summer and fall of 1910 depended solely upon the acts of the Government at the time, and if those acts did not then place the Government in lawful possession, that possession could not thereafter be made lawful by something done in the following March.*

At the time of the conversion, the Government had not *purchased,* but had merely attempted to *lease,* and as it was given no right to lease, its act was on the same basis as if paragraph 33 were not contained in the contract.

It is well settled that any right over property of another, in derogation of the rights of the owner, must be exercised in accordance with the strict language of the grant and the exact nature of the right granted. The only right which the Government could possibly claim was a right to *retain under purchase.* It was given no right to *retain under lease.* Inasmuch as it did not prior to January 30, 1911, see fit to exercise its alleged right to purchase, any possession of the property

under the Government, prior to January 30, 1911, would have been wholly unauthorized even if the Hubbard Company had been the owner.

Colby v. *W. W. Kimball Co.*, 99 Iowa, 321, 68 N. W., 786;
Otis v. *Jones*, 21 Wend., 394;
Goodwyn v. *Goodwyn*, 20 Ga., 600.

When the Government relies for some right on an act done by an agent, it must take the act as it actually exists. That the courts will examine the act of a Government agent to determine its effect, has been frequently held in cases involving the taking of private property by Government agents who either denied the title of the owner, or claimed that the property was Government property. In such cases, as already pointed out in another connection *supra*, it has been held that where an officer of the Government makes use of private property, but denies the title of the owner, or claims some superior title in the United States Government, there is merely a tortious taking by the *agent*, although if the agent had admitted the owner's title, there would have been a taking by the *Government*, for which the Government would have had to pay.

Langford v. *U. S.*, 101 U. S., 341;
Hill v. *U. S.*, 149 U. S., 593;
Schillinger v. *U. S.*, 155 U. S. 163.

Certainly if the Government officer had not taken any action whatever it would not be claimed that the Government had retained the property under purchase. The officer did, as a matter of fact, perform an act, and the question presented under this sub-division is, whether or not that act would have constituted a valid exercise

of the alleged contractual right given in the contract even if the property had been owned by the Hubbard Building & Realty Company. The question thus presented is in no respect different from a similar situation arising between private individuals or corporations.

The Committee found as a conclusion:

> "5. That said paragraph 33 does not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon payment of a rental value to be determined by the Engineer Officer in charge, and the United States did not acquire any title to or right to the possession of said property by virtue of paragraph 33' (fol. 107).

It seems clear that as held by the Committee and the District Court, the attempt to *lease* the property was wholly nugatory, as an attempted exercise of rights under the contract, entirely aside from all questions presented in Subdivisions A and B of the present Point IV.

V.

The decree of the Circuit Court of Appeals and the judgment of the District Court should be reversed and a new trial ordered, or the conclusions and judgment upon the first trial in favor of the plaintiff should be reinstated.

The decision of Judge Wolverton in *Tinker and Scott* v. *U. S. Fidelity and Guaranty Company,*

169 Fed. 211, at page 216 above referred to, sustains the right of the owner of plant and materials located upon the site of Government work, the original contract for which has been annulled, to recover in conversion against a defendant who undertakes the completion of the work and who uses, under an alleged right from the Government officers, the plaintiff's property which the Government officers had seized under a mistaken claim based on a misapprehension of the effect of the Government's contract with the original contractor.

In the case at bar the defendant used the plaintiff's property with clear notice at the time, both from the plaintiff and from the Government, that the plaintiff claimed such use to be unlawful and that the defendant acted at its own risk. The defendant has wholly failed to justify its act and judgment against it now will merely compel it to do what it should have done in 1910, to wit, make payment for the property of the plaintiff which it used.

Respectfully submitted,

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CHARLES D. LOCKWOOD,
WILLIAM M. PARKE,
S. L. SWARTS,
Counsel.

SCHEDULE A.

J. G. White & Co. v. *Ball Engineering Co.*, 223 Fed., 618; 139 C. C. A., 164, Circuit Court of Appeals, Second Circuit. April 13, 1915, No. 214.

"Before LACOMBE, WARD, and ROGERS, *Circuit Judges.*

WARD, *Circuit Judge.*

(1) This is a writ of error to a judgment in favor of the plaintiff for damages for conversion by the defendant of certain personal property specified in the complaint used by defendant in constructing Lock and Dam No. 6 on the Trinity River, Tex. The trial was before a referee, called in Connecticut a "committee" and therefore the only question before us for consideration is whether his findings of fact sustain the judgment. We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find. *Andes* v. *Slauson*, 130 U. S. 435, 9 Sup. Ct., 573, 32 L. Ed., 989; *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S., 489, 32 Sup. Ct., 711, 56 L. Ed., 1177, Ann. Cas., 1914B, 699; *Edenborn* v. *Sim*, 206 Fed., 275, 124 C. C. A., 339.

(2) What seems to us to be the material facts found by the committee were substantially as follows:

July 10, 1906, the Hubbard Building & Realty Company entered into a written agreement with

the United States to construct Lock and Dam No. 6 on the Trinity River, Tex.

Some time in the year 1908 a partnership composed of George A. Carden and P. D. C. Ball, trading under the name of the Ball-Carden Company, placed on the site of the lock and dam a considerable amount of property consisting of machinery, tools, and materials and used the same in constructing the lock and dam until the month of May, 1909.

In April or May, 1909, the partnership was dissolved, Carden transferring all his interest to Ball, who continued the work under the name of Ball Engineering Company until on or about September 8, 1909.

September 9, 1909, work on the lock and dam was discontinued, and on October 22d the government, in accordance with its provisions, annulled the contract with the Hubbard Company.

April 2, 1910, the plaintiff, Ball Engineering Company, was incorporated under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

June 6, 1910, the government entered into a written contract with the defendant, J G. White Company, Inc., to complete the work.

The government took the property belonging to the plaintiff at a value of $11,578 fixed by the engineer and credited the amount in account of the Hubbard Company. It professed to act under section 33 of the contract with the Hubbard Company, which reads:

> 'Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use

> by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge.'

This property the government leased to the defendant, who used the same in completing the work and after completion returned all of it to the government except such material as had been used in construction.

As a conclusion of law, the committee found the defendant had as of July 6, 1910, unlawfully converted the property of the plaintiff mentioned in the complaint of the fair market value of $15,000, for which sum with interest at 6 per cent. from that date the plaintiff was entitled to judgment.

The district judge entered judgment in accordance with the report of the committee, and the defendant has taken this writ of error from the same.

We think the committee and the court below correctly held that the government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject

to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no propietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the government was justified in acting as against the plaintiff under the contract with the Hubbard Company. The plaintiff also relies upon a provision in the contract between the defendant and the government to the effect that:

> 'If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or

purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.'

We regard this provision as quite immaterial. The defendant is making no claim against the government, and the plaintiff is no more concerned with this contract than it was with the contract between the government and the Hubbard Company.

We have considered this general subject in *United States* v. *Buffalo-Pitts Co.*, 193 Fed., 905, 114 C. C. A., 119, affirmed 234 U. S., 228, 34 Sup. Ct., 840, 58 L. Ed., 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

The judgment is reversed."

BALL ENGINEERING COMPANY *v.* J. G. WHITE & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 227. Argued March 13, 1919.—Decided May 19, 1919.

A provision in a construction contract that in case of annulment "the United States all have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, . . . under purchase, at a valuation to be determined by the Engineer Officer in charge," *held* not applicable, *in invitum*, to property belonging to, and which had been used in the construction by, a third party. P. 54.

Upon annulment of a construction contract, the Government retained certain property, on the site, which belonged to a third party who had been doing the work, and, with knowledge of his claim and without his consent, valued it, credited the defaulting contractor accordingly, and leased or disposed of it to a new contractor, at the latter's request, for the completion of the work, upon the understanding that the United States did not undertake to transfer title, nor guarantee peaceable possession, etc., and would not be responsible for the expense or cost of any action against the new contractor nor subject itself to any claim on account of the seizure. *Held*, that no contractual liability could be implied against the United

States, and that the new contractor, having so taken and used the property, was liable to its owner for the conversion. *Id. United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, distinguished 241 Fed. Rep. 989, reversed.

THE case is stated in the opinion.

Mr. William M. Parke and *Mr. Charles D. Lockwood*, with whom *Mr. Homer S. Cummings* and *Mr. S. L. Swarts* were on the brief, for petitioner:

The taking of the plaintiff's property by the officers of the United States was not a taking under eminent domain, but a proprietary taking under a doctrine of private law which did not in any way rest upon the rights of the Government as sovereign and which, if correct in theory, would have been equally available to any private citizen under similar circumstances.

Since the taking was tortious, the plaintiff cannot recover the value from the Government. No title can be acquired by a tortious taking.

Neither the plaintiff nor its predecessors in title ever entered into any contractual relation which had the effect of bringing their property within the operation of the Government's contract with the Hubbard Building & Realty Company, and therefore, no matter what construction be placed upon paragraph 33 of that contract it could not affect the plaintiff's title to the property.

A right to "purchase" plaintiff's property could not be exercised by seizing it and making payment to the Hubbard Building & Realty Company.

The Government, in purporting to exercise its alleged rights under paragraph 33, attempted to retain the plant under lease. Since paragraph 33 did not permit the Government to retain property under lease but only to retain it under purchase, such an effort to lease was wholly nugatory and did not vest any title, interest or right to possession in the Government.

Mr. Harry W. Reynolds and *Mr. J. Kemp Bartlett*, with whom *Mr. Lewis Sperry* was on the brief, for respondent:

The taking of the property by the officers of the United States was a valid exercise of the power of eminent domain. Act March 3, 1905, 33 Stat. 1131; Act of April 24, 1888, 25 Stat. 94; *United States* v. *Certain Lands in Narragansett*, 145 Fed. Rep. 654, 657; *Houck* v. *United States*, 201 Fed. Rep. 867; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228; *United States* v. *Société Anonyme &c.*, 224 U. S. 309; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *s. c.* 124 U. S. 581.

In all these cases, as well as in the case at bar, the Government took property or rights that were needed by it in the making of public improvements or in furtherance of public welfare, but to which it asserted no title vested in the Government prior to the taking. The government engineers made no claim that the property in question had become the Government's property. They asserted that under the terms of the contract the Government had the right to retain and use it in the completion of the work and also to purchase it at a price to be determined by the engineer officer in charge, but the purchase was a mere incident, the important fact being the retention for use in completing the work, of the property involved.

The United States had the right under the specifications to hold and use the property in the completion of the work, and therefore the use by the respondent was not tortious and does not render the respondent liable to the petitioner for a conversion.

The petitioner can succeed solely upon the strength of its own title and its right, if it had any, to the possession of the property in June or July, 1910. That the petitioner was not in either actual or constructive possession of the property at that time or for a long time prior thereto is clearly established. Section 33 of the specifications

is carefully worded so as to include all the buildings, materials, machinery, etc., or any part or parts of same "prepared for use or in use in the prosecution of the wor'," whether the property of the contractor or otherwise. The only limitation is to be found in the words "prepared for use or in use in the prosecution of the work." The buildings, plant and materials assembled upon the work and used by Mr. Ball and his firm were "prepared for use" and were "used in the prosecution of the work."

If the important right reserved to the Government by the contract and which, as section 33 shows, is reserved in "the form of contract in use by the Engineer Department of the Army," can be lost by an arrangement between the nominal contractor and the contractor who actually does the work, by which the one doing the work is allowed to do it in the name and in the place and stead of the nominal contractor, the consequence will be serious, not alone to the Government, but also to all contractors who are in competition for public work with any who may contemplate the creation of a situation that will enable them to play fast and loose with the Government; that is to continue with the work only so long as it is profitable, and withdraw from it with their buildings, plant and materials when it ceases to be advantageous to them to continue. Mr. Ball had actual, or certainly constructive, notice of the provisions of the section at the time when the property was brought to the site. Among other cases involving similar clauses in construction contracts, see: *Tinker & Scott* v. *U. S. Fidelity & Guaranty Co.*, 169 Fed. Rep. 211; *Duplan Silk Co.* v. *Spencer*, 115 Fed. Rep. 689; *Hart* v. *Porthgain Harbour Co.* [1903], 1 L. R. Ch. Div. 690, 696.

The provisions contained in section 33 of the specifications were inserted in the interest of the United States as a security and guarantee that the work would be performed to its completion, and as a protection against loss in the

event of abandonment of the work by the contractor or anyone standing in the contractor's shoes.

It would be imposing a great hardship upon the respondent, to compel it to pay a second time for the material, and an exorbitant sum, in addition to the rental already paid by it to the Government, for the buildings and plant that the Government authorized it to use.

The Solicitor General, by leave of court, filed a brief on behalf of the United States as *amicus curiæ:*

Where the case is not founded on the Constitution of the United States or a law thereof, or a regulation of an executive department, no recovery can be had if the case be one sounding in tort. *United States* v. *Buffalo Pitts Co.*, 193 Fed. Rep. 905, 908, 909; 234 U. S. 228, 232; *Dooley* v. *United States*, 182 U. S. 222; *United States* v. *Lynah*, 188 U. S. 445, 474; *White & Co.* v. *Ball Engineering Co.*, 223 Fed. Rep. 618, 620; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32; *Russell* v. *United States*, 182 U. S. 516, 530, 535; *Peabody* v. *United States*, 231 U. S. 530, 539; *Harley* v. *United States*, 198 U. S. 229, 234; *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 309; *Crozier* v. *Krupp*, 224 U. S. 290, 303, 304; *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202, 206, 207; *Tempel* v. *United States*, 248 U. S. 121.

The claim of the Ball Engineering Company against the United States, if any, does not arise under the Constitution, and, therefore, necessarily is a case sounding in tort. *Peabody* v. *United States*, 231 U. S. 538, 539.

Mr. Justice Day delivered the opinion of the court.

The Ball Engineering Company, a Missouri corporation, brought this action against J. G. White & Company, Inc., a Connecticut corporation, in the United States District Court for the District of Connecticut, for damages for

the alleged conversion of a contractor's plant and equipment, which was prepared for use in prosecuting the work of constructing lock and dam No. 6, on the Trinity River, in the State of Texas, and all of which, including buildings, were located upon the site of the lock and dam at the time of the alleged conversion. The action was tried before a referee, designated under the Connecticut practice a Committee. Two trials were had, the first resulting in a judgment in favor of the plaintiff for the value of the converted property. 212 Fed. Rep. 1009. That judgment was reversed by the Circuit Court of Appeals (223 Fed. Rep. 618), and a new trial ordered which took place before the same Committee, and upon the same evidence and the same findings of fact, in order to conform to the decision of the Circuit Court of Appeals, judgment was rendered in favor of the defendant, and this was affirmed by the Circuit Court of Appeals on the authority of its prior decision. 241 Fed. Rep. 989. The case is here upon writ of certiorari.

The United States filed its brief *amicus curiæ*, contending that the decision of the Circuit Court of Appeals to the effect that the United States is liable under the Tucker Act when property of a third person is taken by one of its agents, under the circumstances disclosed, was erroneous.

The material facts are:

On July 10, 1906, the United States entered into a contract with the Hubbard Building & Realty Company to construct lock and dam No. 6 on the Trinity River, Texas.

A partnership composed of George A. Carden and P. D. C. Ball, known as the Ball Carden Company, in the year 1908 placed a considerable amount of property, consisting of materials, machinery and tools, on the site of the lock and dam No. 6, and used them in constructing the lock and dam until the month of May, 1909.

This partnership was dissolved in April or May, 1909,

and discontinued the work theretofore carried on by it in the construction of the lock and dam. Carden transferred all his interest to Ball, who, under the name of the Ball Engineering Company, continued the work until on or about September 8, 1909.

It does not appear under what circumstances the Ball Carden Company or Ball operating as the Ball Engineering Company undertook the performance of the work.

On September 9, 1909, work upon said lock and dam was abandoned; on October 22, 1909, the Government annulled the contract with the Hubbard Company, pursuant to its provisions.

On April 2, 1910, the Ball Engineering Company was organized under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

The United States entered into a contract with the defendant J. G. White & Company on June 6, 1910, to complete the construction of the lock and dam. Prior to the making of the contract the defendant attempted, without success, to agree with the Ball Company for the purchase or rental of the personal property, etc., specified in the complaint. On June 22, 1910, the Government notified the defendant that the Hubbard Company had been directed to move all property at lock and dam No. 6, except certain specified items, and determined the valuation of the same at $11,578, and fixed a monthly rental of $380 therefor from the Government to the defendant, and also fixed a valuation upon the material, etc., at the lock-site and notified the defendant to take such of it as it deemed proper, at such valuations respectively. The Ball Company refused to assent to either valuation. On July 18, 1910, the defendant receipted to the United States for the articles constituting the construction plant, and for such of the materials as it was willing to and did receive. The property which the Government took from the

Ball Engineering Company was valued by it at $11,578, which amount was credited on account of the Hubbard Company; but the United States neither paid, nor credited the purchase price or rental of the property to the Ball Company.

The United States professed to act under section 33 of the contract with the Hubbard Company, which reads:

"Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the Engineer Officer in charge."

The Government would not allow the Ball Company to take possession of any of the property used in the construction of the lock and dam. This property the United States leased to the defendant, who used the same in completing the work, and thereafter returned all of it to the Government, except, of course, such material as had been used in construction.

The Government inserted the following stipulation in its contract with the J. G. White & Company, Inc., "If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the

prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

The Circuit Court of Appeals, under the circumstances here disclosed, rightly held that the Government had no authority to take the property of the Ball Engineering Company by virtue of anything contained in its contract with the Hubbard Company. And further held that inasmuch as the Government took the property with the knowledge that it was claimed by the Ball Company and used it in the construction of public work, it was obliged to make just compensation to the Ball Company by reason of the Fifth Amendment of the Constitution. "It," says the Court of Appeals, "made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto."

The findings show that the Government took possession by virtue of its contract with the Hubbard Company; that it definitely advised White & Company that it would

not be responsible for the seizure of the property, and that anything which might result therefrom could not be the basis for any claim against the United States, its officers or agents. Under the circumstances disclosed the Circuit Court of Appeals held the White Company not liable to the Ball Engineering Company—upon the theory that the Government had appropriated the property under circumstances giving rise to an implied contract to pay the Ball Engineering Company for it. This ruling was made upon the authority of *United States* v. *Buffalo Pitts Company*, 193 Fed. Rep. 905, affirmed 234 U. S. 228. In that case a suit was brought under the Tucker Act by the Buffalo Pitts Company against the United States to recover for the value of the use of a certain engine for which, it was alleged, the United States was under an implied contract to pay. The findings of fact showed that the Buffalo Pitts Company sold a traction engine to the Taylor-Moore Construction Company, and took a chattel mortgage to secure the payment of the purchase money. The mortgage was duly recorded, and no part of the purchase money was paid. The engine was put into service by the Taylor-Moore Company upon a reclamation project undertaken by the Interior Department, the work being prosecuted under a contract between the United States and the Taylor-Moore Construction Company. The Construction Company defaulted in its work, and assigned all of its interest in the contract to the United States, and it took possession of all material, supplies and equipment belonging to the Construction Company, including the engine in question. The Buffalo Pitts Company made demand upon the District Engineer of the Reclamation Service for the possession of the engine and appurtenances. But the demand was refused, and the engine retained for use in the Government work. The Buffalo Pitts Company notified the representative of the United States of the execution and filing of its mortgage,

and claimed the property. It was expressly found that the Government had at all times known of the existence of the mortgage, and did not dispute the validity thereof, but represented to the Buffalo Pitts Company that it was using and would continue to use the engine in its work, that any legal proceedings to recover possession would be resisted, and that if the property were left in the Government's possession its attorney would recommend payment therefor. It was further found that the Buffalo Pitts Company relied upon these facts, and consented to the Government retaining possession of its property—in the expectation of receiving compensation from it therefor. The claim was made that the United States was not liable for tortious acts. This court reviewed former cases, and said: "In the present case, as we have said, there is nothing to show that the Government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the Government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee."

It was further pointed out that the Government had authority under an act of Congress to acquire any property necessary for the purpose stated, and, if need be, to appropriate it. We held that the facts found brought the case within the principles decided in former cases and made the United States liable, not for a tortious act, but upon implied contract.

The subject was again reviewed by this court in a case decided at this term, *Tempel* v. *United States*, 248 U. S.

121, in which a suit was brought to recover the value of submerged lands in the Chicago River appropriated by the Government without the owner's consent. Former decisions of this court were reviewed, and we said: "If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. *Bigby* v. *United States*, 188 U. S. 400; *Hijo* v. *United States*, 194 U. S. 315, 323. As stated in *United States* v. *Lynah*, 188 U. S. 445, 462, 465: 'The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses'; or in other words: 'Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.' But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff."

In the case under consideration the United States did not concede title in the Ball Engineering Company, but took the property knowing of the claim of that Company to its ownership, and credited its value upon the government contract with the Hubbard Company. The Government took this action upon request of the White Company, and advised that it would not under any circumstances be held liable for the seizure of the property. Under these circumstances, the implication of a contract that the United States would pay, which must be the basis of its liability under the Fifth Amendment, is clearly rebutted. The liability of the Government, if any, is in tort, for which it has not consented to be sued. As the findings show that

the White Company, with knowledge of the facts, procured and used the property of the Ball Company it ought to have been held liable to that Company. It follows that the judgment of the Circuit Court of Appeals must be

Reversed.